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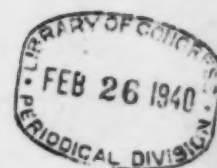
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AMERICAN BAR ASSOCIATION JOURNAL

MARCH
1940

VOL. XXVI
NO. 3.



Supreme Court's 150th Anniversary—Addresses

More American Bar History
By MAX RADIN

Abraham Lincoln and the Statehood of Nevada
By F. LAURISTON BULLARD

Swedish Experiment in Legal Service for Low Income Groups
By DEAN LLOYD K. GARRISON

Review of Recent Supreme Court Decisions

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AMERICAN BAR ASSOCIATION JOURNAL

MARCH
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VOL. XXVI
NO. 3

Washington Letter

William E. Borah

FOREMOST constitutional lawyer of the Senate, champion of pure Americanism, hero of many battles in the cause of conscience, the tenderest of men, the toughest of fighters, the dean of the Senate, Borah is dead.

Idaho lost a Senator; the whole nation lost a statesman of the first order. Recently he said there was but one question as to any legislation which he wanted answered—whether it was for “the best interests of the United States.”

History has been made by many of his battles, notably against the League of Nations, ratification of the Versailles Treaty, and the proposal that we enter the World Court; for the income tax amendment and for the direct election of Senators instead of by the State legislatures; and against the plan to remake the Supreme Court. Unexcelled in humanitarianism, he opposed enactment of anti-lynching legislation by the federal government because he believed such measures an unconstitutional invasion of States' rights. However, as a young man, he showed the highest degree of personal courage by aiding in the saving of a negro from a mob apparently bent on lynching.

The interesting and highly dramatic points in his career would fill books. Tributes paid by colleagues and other friends were most sincere. Several are in the Congressional Record for January 23, 1940, p. 941, Appendix. William Edgar Borah was born in Wayne County, Illinois, June 29, 1865, being slightly more than 74 years and six months old at his death January 19, 1940. He received his education at the Southern Illinois Academy, Enfield, Illinois, and at Kansas State University, having been admitted to practice law in September 1890, at Lyons, Kansas. He devoted his time exclusively to the practice of law until elected from Boise, Idaho, to the United States Senate January 15, 1907, where he served constantly up to his death. His wife, who survives him, was Mary McConnell, daughter

of a former Governor of Idaho. They had no children. He is survived also by a sister, Mrs. Mattie Rinard of Fairfield, Illinois, and a nephew, Wayne G. Borah, a federal judge in New Orleans. The cause of his death was a fall in the bath room of his apartment four days before. During most of that time he was in a coma; and the end came quietly.

The statement issued by President Roosevelt said: “The Senate and the Nation are sadly bereft by the passing of Senator Borah. We shall miss him and mourn him and long remember the superb courage which was his. He dared often to stand alone and even at times to subordinate party interest when he presumably saw a divergence of party interest and the national interest.

“Fairminded, firm in principle and shrewd in judgment, he sometimes gave and often received hard blows, but he had great personal charm and a courteous manner which had its source in a kind heart. He had thought deeply and studied patiently all the great social, political and economic questions which had so vitally concerned his countrymen during the long period of his public service.

“His utterances commanded the close attention of the Senate and of a far-flung audience whenever he spoke. A unique figure, his passing leaves a void in American public life.”

150th Anniversary

The 150th anniversary of the first assembling of the United States Supreme Court was recognized by the Court at its regular meeting February 1, 1940, with addresses by Chief Justice Charles Evans Hughes, Attorney General Robert H. Jackson, and President Charles A. Beardsley, of the American Bar Association.

Nationwide participation in the Court's sesquicentennial included exercises, locally sponsored, at the graves of the deceased Chief Justices and Associate Justices throughout the coun-

try. There were nine former Justices buried in and around Washington, D. C. Wreaths were placed on these several graves by committees of representative members of the Bar Association of the District of Columbia, the Women's Bar Association of the District of Columbia, and the Federal Bar Association. The general chairman of the joint committee of these Associations was William P. MacCracken. The entire anniversary was sponsored by a Joint Committee of the Senate and House of Representatives of which Congressman Sol Bloom, of New York, was Chairman.

The members of the local committees who were to visit the graves of the Justices assembled in the Senate restaurant at the Capitol for an 8:30 breakfast, after which they visited the Supreme Court's last former court room in the Capitol and then proceeded in nine groups, with motorcycle police escorts, to the cemeteries.

A folder of historic value was presented to each attorney in attendance at the sesquicentennial session of the Supreme Court and to those who participated in the service of laying the wreaths on the graves of deceased members buried in the vicinity of Washington. It showed etchings of the first Chief Justice, John Jay, and of present Chief Justice Charles Evans Hughes, a beautiful color engraving of the Court's seal and a list of names, dates, (and places of burial for those deceased) of all the Chief Justices and Associate Justices of the Court to date, including the five appointees who declined the office, did not take the oath, and therefore did not become members of the Court.

D. C. Bar Meeting

The recent monthly meeting of the District of Columbia Bar Association showed a substantial amount of constructive work in process. Three new committees appointed by President Francis W. Hill, Jr., had made good progress. They were: the Committee on Sections, headed by Sefton Darr, former president of the Association, which has formulated plans for various groups within the association, in order

that the lawyers interested in particular subjects may be brought more closely together, in a manner similar to that followed by the American Bar Association; the Committee on Jurisprudence and Law Reform, of which Herbert M. Bingham is chairman; and the Committee on Low Cost Legal Service, the chairman being Nathan M. Lubar. The Association, previously having gone on record as favoring in principle the creation of the office of Public Defender, is hopeful that such legislation may be enacted at this session of Congress.

Immigration Legislation

It is probable that new enactments will be made at this session of Congress on the subject of immigration. Some of the drift of the congressional mind may be determined from a recent opening up of the discussion in the Senate. Senator Reynolds, of North Carolina, had introduced five bills in the previous session: S. 407, to further reduce immigration, to authorize the exclusion of any alien whose entry into the United States is inimical to the public interest, and to prohibit the separation of families through the entry of aliens leaving dependents abroad; S. 408, to provide for the national defense by the registration and fingerprinting of aliens in the United States; S. 409, to protect American labor and stimulate the employment of American citizens on American jobs by restricting immigration for the next 10 years; S. 410, to provide for the deportation of aliens subsisting on relief under certain circumstances; and S. 411, to provide for the deportation of aliens inimical to the public interest.

The current discussion centered principally around S. 409, which had been substantially changed by the Committee on Immigration and was the subject of Senate Report No. 757. Senator Reynolds explained, in a number of instances, why he disagreed with the changes which the Committee had made in his bill. At one place he said, "instead of my proposal that all immigration into the United States be suspended for a period of 10 years, or until such time as the Department of Labor shall certify to Congress that unemployment in the United States does not exceed 3,000,000 persons, my colleagues on the Committee on Immigration have proposed an arbitrary suspension of 5 years, without regard to the extent of unemployment in the United States." He agreed to the substance of this change by the Committee but with certain modifications incorporated in a separate bill, S. 3201, which he called a substitute bill, and introduced as an amendment to section 1 of the Committee's draft of S. 409.

In further explanation, Senator Reynolds said: "Under the present law—sections 4, 6, and 9 of the Immigration Act of 1924—a citizen of the United States is entitled to bring in his wife, or husband, as the case may be, or unmarried child under 21, as a nonquota immigrant; but section 5 of Senate bill 409 would grant these privileges to immigrants who have been lawfully admitted to the United States and who have not become citizens. In other words, the noncitizen is placed on the basis with the citizen—and that being the case, there are 3,628,103 aliens here who under this section would be entitled to bring in their relatives as nonquota immigrants, without any limitation whatsoever upon their number. . . .

"If Senate bill 409 were enacted, it would have the effect of putting aliens who arrive illegally in the same status as aliens in this country who arrived legally, or in the same status as citizens of the country who are entitled to bring in their relatives from abroad." But he said "the substitute bill in regard to which we can have no difference of opinion . . . merely suspends new immigration of persons who have no claims upon any alien lawfully admitted to the United States. The substitute simply upholds the basic principle of numerical restriction upon immigration into the United States under the quotas, as provided for by the act of 1924, with broad humanitarian consideration for aliens of good standing now in this country."

As indicating the need for improvement in our immigration laws, Senator Reynolds said: "It was stated by a former Commissioner of Immigration of this administration that there are 20,000 habitual alien criminals who are not subject to deportation, due to defects in our existing law. In addition to those 20,000 there are in the United States an unknown number of aliens who came here illegally. The latter class of aliens are deportable. . . .

"Who knows how many aliens have slipped into the country? We all know that the division of the Labor Department interesting itself in border patrol certainly has not enough men provided actually and physically to patrol the . . . border It is a very difficult thing; and nobody knows—I would not undertake to say—how many aliens have illegally come into this country. I would not undertake to say how many aliens are illegally coming into this country every night, but I do say that the American people in the present conditions are entitled to know how many there are in this country. I think we ought to take action to bring about the enactment of a measure such as the one

to which I have referred, for we are all interested in the present condition."

There was an impression of general agreement with the remarks of Senator King, of Utah, when he said: "It seems to me that in periods of world disturbance and confusion we should not become hysterical; we should not see substance where there are only shadows, and we should hesitate to brand persons as being guilty of subversive activities unless there is ample and sufficient reason for so doing. It is a serious thing to brand a man as being an enemy to our country when there is no foundation for the charge. I sometimes have felt, as I felt during the early period of the World War, that we were a little too prone to exaggerate conditions, to accentuate small evils, and make of them very serious manifestations of offense against the Government."

Senator Reynolds: ". . . I think the Senator's remarks are very pertinent, because at a time like this there is apt to be hysteria, and I do not think anyone should be branded falsely; but it is the duty of our country to be careful and to guard our interests." Quotations from Congressional Record of January 25, 1940, pp. 1068-1072.

Charles Henry Butler

After a very brief illness, Charles Henry Butler died at Emergency Hospital, in Washington, February 9, 1940. He was 80 years old last June 18th; and had been a member of the American Bar Association for 54 years. He was reporter of the decisions of the United States Supreme Court from about 1900, until his resignation in 1916, having edited volumes 187 to 242 of the United States Reports. He was an authority on foreign trade relations.

Mr. Butler, 50 years ago, was Secretary of the Committee in charge of celebration of the centennial of the Supreme Court. He was a member of the American Bar Association special committee in charge of the recent celebration of the sesquicentennial of the Court and attended the ceremonies February 1st. As a remembrance of the ceremony of 50 years ago, he presented copies of the menu, used at that event, to the Justices of the present Supreme Court and to President Beardsley of the American Bar Association.

Mr. Butler's wife, Marcia Flagg Butler, died in 1928 and his only daughter, Mrs. Edward C. Heald, died in 1936. They had three sons, and Mr. Butler, at the time of his death, was in the practice of law, in Washington, with his youngest son, Henry Franklin Butler, also a member of the American Bar Association.

1790-ROYAL EXCHANGE BUILDING, FOOT OF BROAD STREET, NEW YORK CITY, WHERE SUPREME COURT HELD ITS FIRST AND SECOND TERMS

1791-1800-THIRD TERM OF SUPREME COURT WAS HELD IN CITY HALL (ALSO CALLED CONGRESS HALL) IN PHILADELPHIA. FOR A BRIEF TIME THE COURT MAY HAVE MET IN THE STATE HOUSE, SHOWN IN BACKGROUND



1800-1808-FIRST ROOM IN THE CAPITOL OCCUPIED BY THE SUPREME COURT. IT IS NOW THE OFFICE OF THE SENATE SERGEANT-AT-ARMS



1814- WHEN THE CAPITOL WAS BURNED BY THE BRITISH IN AUGUST 1814, THE COURT MET IN THE CLERK'S RESIDENCE, 204 & 206 PENNSYLVANIA AVE, S.E.



HONORABLE CHARLES EVANS HUGHES
Chief Justice of the United States

Harris & Ewing

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One Hundred and Fiftieth Anniversary of First Session of Supreme Court

ADDRESS OF CHIEF JUSTICE HUGHES

MR. ATTORNEY GENERAL and Mr. Beardsley: The Court welcomes the words of appreciation you have spoken in recognition of the one hundred and fiftieth anniversary of the day appointed for the first session of this tribunal. We are highly gratified at the presence of distinguished Senators and Representatives,—the members of the Judiciary Committees of the Houses of Congress and of the Special Joint Committee appointed in relation to this occasion. We trust that what has been said echoes a sentiment cherished in the hearts of the American people. They have again and again evinced the sound instinct which leads them, regardless of any special knowledge of legal matters, to cherish as their priceless possession the judicial institutions which safeguard the reign of law as opposed to despotic will. Democracy is a most hopeful way of life, but its promise of liberty and of human betterment will be but idle words save as the ideals of justice, not only between man and man, but between government and citizen, are held supreme.

The States have the power and privilege of administering justice except in the field delegated to the Nation, and in that field there is a distinct and compelling need. The recognition of this anniversary implies the persistence, through the vicissitudes of one hundred and fifty years, of the deep and abiding conviction that amid the clashes of political policies, the martial demands of crusaders, the appeals of sincere but conflicting voices, the outbursts of passion and of the prejudices growing out of particular interests, there must be somewhere the quiet, deliberate and effective determination of an arbiter of the fundamental questions which inevitably grow out of our constitutional system and must be determined in controversies as to individual rights. It is the unique function of this Court, not to dictate policy, not to promote or oppose crusades, but to maintain the balance between States and Nation through the maintenance of the rights and duties of individuals.

But necessary as is this institution, its successful working has depended upon its integrity and the confidence thus inspired. By the method of selection, the tenure of office, the removal from the bias of political ambition, the people have sought to obtain as impartial a body as is humanly possible and to safeguard their basic interests from impairment by the partiality and the passions of politics. The ideals of the institution cannot, of course, obscure its human limitations. It does most of its work without special public attention to particular decisions. But ever and anon arise questions which excite an intense public interest, are divisive in character, dividing the opinion of lawyers as well as laymen. However serious the division of opinion, these cases must be decided. It should occasion no surprise that there should be acute differences of opinion on difficult questions of constitutional law when in every other field of human achievement, in art, theology, and even on the highest levels of scientific research, there are expert disputants. The more weighty the question, the more serious the debate, the more likely is the opportunity for honest and expert disagreement. This is a token of vitality. It is for-

tunate and not regrettable that the avenues of criticism are open to all whether they denounce or praise. This is a vital part of the democratic process. The essential thing is that the independence, the fearlessness, the impartial thought and conscientious motive of those who decide should both exist and be recognized. And at the end of 150 years, this tribunal still stands as an embodiment of the ideal of the independence of the judicial function in this, the highest and most important sphere of its exercise.

We cannot recognize fittingly this anniversary without recalling the services of the men who have preceded us and whose work has made possible such repute as this institution enjoys. This tribunal works in a highly concrete fashion. The traditions it holds have been wrought out through the years at the conference table and in the earnest study and discussions of men constantly alive to a supreme obligation. We do not write on a blank sheet. The Court has its jurisprudence, the helpful repository of the deliberate and expressed convictions of generations of sincere minds addressing themselves to exposition and decision, not with the freedom of casual critics or even of studious commentators, but under the pressure and within the limits of a definite official responsibility.

To one who over twenty-nine years ago first took his seat upon this Bench, this day is full of memories of associations with those no longer with us, who wrought with strength and high purpose according to the light that was given them, in complete absorption in their judicial duty. We pay our tribute to these men of the more recent period as we recognize our indebtedness to their eminent predecessors. We venerate their example. Reflection upon their lives brings emphasis to the thought that even with the tenure of the judicial office, the service of individuals however important in their day soon yields to the service of others who must meet new problems and carry on in their own strength.

The generations come and go but the institutions of our Government have survived. This institution survives as essential to the perpetuation of our constitutional form of government,—a system responsive to the needs of a people who seek to maintain the advantages of local government over local concerns and at the same time the necessary national authority over national concerns, and to make sure that the fundamental guarantees with respect to life, liberty and property, and of freedom of speech, press, assembly and religion shall be held inviolate. The fathers deemed that system of government well devised to secure the blessings of liberty to themselves and their posterity. Whether that system shall continue does not rest with this Court but with the people who have created that system. As Chief Justice Marshall said: "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will." It is our responsibility to see that their will as expressed in their Constitution shall be faithfully executed in the determination of their controversies.

And deeply conscious of that responsibility, in the spirit and with the loyalty of those who have preceded us, we now rededicate ourselves to our task.

ADDRESS OF HONORABLE ROBERT H. JACKSON ATTORNEY GENERAL OF THE UNITED STATES

MR. CHIEF JUSTICE and Associate Justices of the Supreme Court of the United States: The Bar of the Supreme Court, including those who here represent the executive branch of the government, desires to observe with you the one hundred fiftieth anniversary of this Court's service. We do so in a spirit of rededication to the great principles of freedom and order which come to life in your judgments.

The Court as we know it could hardly have been foreseen from its beginnings. When it first convened, no one seemed in immediate need of its appellate process, and it adjourned—to await the perpetration of errors by lower courts. Errors were, of course, soon forthcoming. The Justices who sat upon the Bench, although not themselves aged, were older than the Court itself. The duration of an argument was then measured in days instead of hours. All questions were open ones, and neither the statesmanship of the Justices nor the imagination of the advocate was confined by the ruling case. Some philosophers have so feared the weight of tradition as to assert that happy are a people who have no history. We, however, may at least believe that there was some happiness in belonging to a bar that had little occasion to distinguish precedents or in sitting upon a Court that could not be invited to overrule itself. Few tribunals have had greater opportunity for original and constructive work, and none ever seized opportunity with more daring and wisdom.

From the very beginning the duties of the Court required it, by interpretation of the Constitution, to settle doubts which the framers themselves had been unable to resolve. Luther Martin in his great plea in *McCulloch v. Maryland* was not only an advocate but a witness of what had been and a prophet of things to come. He said: "The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory." Thus, controversies so delicate that the framers would have risked their unity if an answer had been forced were bequeathed to this Court. During its early days it had the aid of counsel who expounded the Constitution from intimate and personal experience in its making. They knew that to get acceptance of its fundamental design for government many controversial details were left to be filled in from time to time by the wisdom of those who were to follow. This knowledge made them bold.

The passing of John Marshall marked the passing of that phase of the Court's experience. Thereafter the Constitution became less a living and contemporary thing—more and more a tradition. The work of the Court became less an exposition of its text and setting and purposes and became more largely a study of what later men had said about it. The Constitution was less resorted to for deciding cases, and cases were more resorted to for deciding about the Constitution. This was the inevitable consequence of accumulating a body of judicial experience and opinion which the legal profession would regard as precedents.

It would, I am persuaded, be a mistake to regard the work of the Court of our own time as either less

important or less constructive than that of its earlier days. It is perhaps more difficult to revise an old doctrine to fit changed conditions than to write a new doctrine on a clean slate. But, as the underlying structure of society shifts, its law must be reviewed and rewritten in terms of current conditions if it is not to be a dead science.

In this sense, this age is one of founding fathers to those who follow. Of course, they will reexamine the work of this day, and some will be rejected. Time will no doubt disclose that sometimes when our generation thinks it is correcting a mistake of the past, it is really only substituting one of its own. But the greater number of your judgments become a part of the basic philosophy on which a future society will adjust its conflicts.

We who strive at your bar venture to think ourselves also in some measure consecrated to the task of administering justice. Recent opinions have reminded us that the initiative in reconsidering legal doctrine should come from an adequate challenge by counsel. Lawyers are close to the concrete consequences upon daily life of the pronouncements of this Court. It is for us to bring the cases and to present for your corrective action any wrongs and injustices that result from operation of the law.

However well the Court and its bar may discharge their tasks, the destiny of this Court is inseparably linked to the fate of our democratic system of representative government. Judicial functions, as we have evolved them, can be discharged only in that kind of society which is willing to submit its conflicts to adjudication and to subordinate power to reason. The future of the Court may depend more upon the competence of the executive and legislative branches of government to solve their problems adequately and in time than upon the merit which is its own. There seems no likelihood that the tensions and conflicts of our society are to decrease. Time increases the disparity between underlying economic and social conditions, in response to which our Federation was fashioned, and those in which it must function. Adjustment grows more urgent, more extensive, and more delicate. I see no reason to doubt that the problems of the next half century will test the wisdom and courage of this Court as severely as any half century of its existence.

In a system which makes legal questions of many matters that other nations treat as policy questions, the bench and the bar share an inescapable responsibility for fostering social and cultural attitudes which sustain a free and just government. Our jurisprudence is distinctive in that every great movement in American history has produced a leading case in this Court. Ultimately, in some form of litigation, each underlying opposition and unrest in our society finds its way to this judgment seat. Here, conflicts were reconciled or, sometimes, unhappily, intensified. In this forum will be heard the unending contentions between liberty and authority, between progress and stability, between property rights and personal rights, and between those forces defined by James Bryce as cen-

(Continued on page 214)



SUPREME COURT BUILDING

Harris & Ewing

ADDRESS OF CHARLES A. BEARDSLEY, PRESIDENT OF THE AMERICAN BAR ASSOCIATION

MR. CHIEF JUSTICE and the Associate Justices of the Supreme Court of the United States:

I appreciate this opportunity, which has been accorded to me as the representative of the American Bar Association, to participate in this commemoration of the 150th anniversary of the first session of this honorable Court.

It is most fitting that this event should be commemorated. Its commemoration may well serve to recall to the minds of the American people the purposes of the founders of our National Government, and the part, in the fulfillment of those purposes, that this Court was intended to take, has taken, and will take in the years to come. And this commemoration may well serve, further, to challenge the American people to dedicate themselves anew to the fulfillment of those purposes.

In the Preamble of our Constitution, its framers recited the purposes to attain which the Constitution was to be ordained and established. In this recital, the purpose to "establish justice" is second only to the purpose "to form a more perfect union."

Daniel Webster reminds us that justice is "the ligament that holds civilized beings together," and "the greatest interest of man on earth."

To the end that they might "establish justice," to the end that they might provide "the ligament that holds civilized beings together," to the end that they might strengthen the foundation of civilization on the North American Continent, and to the end that they might serve "the greatest interest of man on earth," the framers of the Constitution provided therein for a federal judiciary, with this Court as its head, to administer "justice" under and pursuant to law.

In the words of President Washington this Court was intended to be "the keystone of our political fabric." And it was intended to be the protector of our Constitution and of the inalienable rights of a free people.

Gladstone's characterization of our Constitution, as "the most wonderful product ever struck off at a given time by the brain and purpose of man," is justified by the fact that, for 150 years, this Court has approached as near as any human institution might well be expected to approach the fulfillment of the purpose of the framers of the Constitution, to "establish justice" for the American people.

We may properly take pride in the extent to which this Court has approached that fulfillment, realizing as we do, as Addison reminds us, that to be just "to the utmost of our abilities, is the glory of man," and that "to be perfectly just, is an attribute of the divine nature."

Not only is it permissible on this occasion for us to recall that this Court is a human institution, but it is also desirable for the American people to recall, on this occasion, that this human institution will endure, and that justice, under and pursuant to law, will be preserved for the American people, only so long as the American people, by their alertness, fidelity and sanity, cause them to be preserved and to endure.

For there are forces at work, in the world today, that are inimical to the continued fulfillment by this Court of the purpose for which it was created.

As a result of the workings of these forces, in substantial parts of the world, national temples of justice are no longer honored or worthy of honor, and international morality and law are giving ground to international immorality and anarchy. And many hundreds of millions of people are engaged in war, seeking to settle their differences, not according to justice, but by force—by the use of a means that is calculated to bring victory to the strongest, or to the most unscrupulous, of the contending peoples, wholly regardless of justice.

And, even within our own borders, there are forces at work that are inimical to the principles upon which our Government is founded, including the principle of justice under and pursuant to law.

Thus, there is a tendency, among groups of employers and employees, to use physical force as the means of settling differences, instead of being willing to use the administration of justice—the institution devised by man, when he was emerging from barbarism, as a substitute for combats, for fights and for wars—an institution that is calculated to bring victory to the contending party who has the most justice on his side, regardless of the relative physical strength of the contending parties.

Also, we have among us many people who are eternally striving to inculcate doctrines that, in other parts of the world, are producing international lawlessness, anarchy and war, doctrines that, in other parts of the world, are destroying temples of justice, and doctrines that, in other parts of the world, are depriving the people of their liberties, and of their lives.

And finally, there is an all-too-widespread inclination to disregard the fundamental principles, upon which our Government, and our Civilization, are founded, and an all-too-general disposition to ignore the historic warning that "eternal vigilance is the price of liberty."

For 150 years, the American people have honored, respected and sustained this Court, and through the years this Court has gained for itself the gratitude and affectionate regard of the American people, because the American people have been steadfast in their devotion to the fundamental principles upon which our Government is founded, and because the American people have seen in the record of this Court the evidence of the striving by its members to be just, "to the utmost of" their "abilities."

This Court has gained, and has retained, this honor, this respect, this gratitude, and this affectionate regard, although, in the words of a nineteenth century publicist, this Court has no "palaces or treasures, no arms but truth and wisdom, and no splendor but the justice and publicity of its judgments."

On this occasion, as we commemorate the 150th anniversary of the first session of this Court, we dedicate ourselves anew, to the task of defending our Constitution, to the task of guarding our liberties, and to the task of strengthening, defending and preserving this Court, as "the keystone of our political fabric," as the protector of our Constitution, and as the guarantor of justice for the American people under and pursuant to law, not only for another 150 years, but also for all time.

List of Chief Justices and Associate Justices of the Supreme Court of the United States, Prepared by the Joint Committees of the Senate and House of Representatives, Hon. Sol. Bloom, Chairman.

Chief Justices of the United States

John Jay, N. Y.; (Washington), com. Sept. 26, 1789; res. June 29, 1795; declined reappointment on Commission of Dec. 19, 1800; d. May 17, 1829; int. Jay Family Cemetery, Rye, N. Y.

John Rutledge, S. C.; (Washington), com. July 1, 1795; nomination rejected by Senate Dec. 15, 1795; d. July 23, 1800; int. St. Michael's Cemetery, Charleston, S. C.

William Cushing, Mass.; (Washington), com. Jan. 27, 1796; declined appointment, but continued as Associate Justice.

Oliver Ellsworth, Conn.; (Washington), com. Mar. 4, 1796; res. Sept. 30, 1800; d. Nov. 26, 1807; int. Old Cemetery, Windsor, Conn.

John Marshall, Va.; (Adams), com. Jan. 31, 1801; d. July 6, 1835; int. Shackoe Hill, Richmond, Va.

Roger B. Taney, Md.; (Jackson), com. Mar. 15, 1836; d. Oct. 12, 1864; int. Roman Catholic Cemetery, Frederick, Md.

Salmon P. Chase, Ohio; (Lincoln), com. Dec. 6, 1864; d. May 7, 1873; int. Oak Hill Cemetery, Washington, D. C.; reint. Spring Grove Cemetery, Cincinnati, O.

Morrison R. Waite, Ohio; (Grant), com. Jan. 21, 1874; d. Mar. 23, 1888; int. Woodlawn Cemetery, Toledo, Ohio.

Melville W. Fuller, Ill.; (Cleveland), com. July 20, 1888; d. July 4, 1910; int. Graceland Cemetery, Chicago, Ill.

Edward D. White, La.; (Taft), com. Dec. 12, 1910; d. May 19, 1921; int. Oak Hill Cemetery, Washington, D. C.

Wm. Howard Taft, Conn.; (Harding), com. June 30, 1921; res. Feb. 3, 1930; d. March 8, 1930; int. Arlington Cemetery, Arlington, Va.

Charles Evans Hughes, N. Y.; (Hoover), com. Feb. 13, 1930.

Associate Justices of the Supreme Court of the United States

John Rutledge, S. C.; (Washington), com. Sept. 26, 1789; res. Mar. 5, 1791; d. July 23, 1800; int. St. Michael's Cemetery, Charleston, S. C.

William Cushing, Mass.; (Washington), com. Sept. 27, 1789; d. Sept. 13, 1810; int. Scituate, Mass.

*Robert H. Harrison, Md.; (Washington), com. Sept. 28, 1789; Apr. 20, 1790.

James Wilson, Pa.; (Washington), com. Sept. 29, 1789; d. Aug. 28, 1798; int. Johnston Burial Ground, Edenton, N. C.; reint. Christ Churchyard, Philadelphia, Pa.

John Blair, Va.; (Washington), com. Sept. 30, 1789; res. Jan. 27, 1796; d. Aug. 31, 1800; int. Bruton Parish Churchyard, Williamsburg, Va.

James Iredell, N. C.; (Washington), com. Feb. 10, 1790; d. Oct. 20, 1799; int. Johnston Burial Ground, Edenton, N. C.

Thos. Johnson, Md.; (Washington), com. Aug. 5, 1791; res. Mar. 4, 1793; d. Oct. 25, 1819; int. All Saint's Episcopal Churchyard, Frederick, Md.; reint. Mount Olivet Cemetery, Frederick, Md.

William Paterson, N. J.; (Washington), com. Mar. 4, 1793; d. Sept. 9, 1806; int. Manor House Vault, Albany, N. Y.

Samuel Chase, Md.; (Washington), com. Jan. 27, 1796; d. June 19, 1811; int. Old St. Pauls Cemetery, Baltimore, Md.

Bushrod Washington, Va.; (Adams), com. Sept. 29, 1798; d. Nov. 26, 1829; int. Mt. Vernon, Va.

Alfred Moore, N. C.; (Adams), com. Dec. 10, 1799; res. Mar. 1804; d. Oct. 15, 1810; int. St. Philip's Churchyard, Old Brunswick, near Southport, N. C.

William Johnson, S. C.; (Jefferson), com. Mar. 26, 1804; d. Aug. 11, 1834; int. West Cemetery, St. Philip's Church, Charleston, S. C.

Brockholst Livingston, N. Y.; (Jefferson), com. Nov. 10, 1806; d. Mar. 18, 1823; int. Vault, Wall Street Churchyard (Trinity Church), New York City, N. Y.

Thomas Todd, Ky.; (Jefferson), com. Mar. 3, 1807; d. Feb. 7, 1826; int. Frankfort Cemetery, Frankfort, Ky.

*Levi Lincoln, Mass.; (Madison), com. Jan. 7, 1811; d. Apr. 14, 1820.

*John Quincy Adams, Mass.; (Madison), com. Feb. 22, 1811; d. Feb. 23, 1848.

Joseph Story, Mass.; (Madison), com. Nov. 18, 1811; d. Sept. 10, 1845; int. Mount Auburn Cemetery, Cambridge, Mass.

Gabriel Duvall, Md.; (Madison), com. Nov. 18, 1811; res. Jan. 1835; d. Mar. 6, 1844; int. Duvall Estate, Glenn Dale, Prince Georges County, Md.

Smith Thompson, N. Y.; (Monroe), com. Sept. 1, 1823, d. Dec. 18, 1843; int. Livingston Burial Ground, Poughkeepsie, N. Y.

Robert Trimble, Ky.; (J. Q. Adams), com. May 9, 1826; d. Aug. 25, 1828; int. Paris Cemetery, Paris, Ky.

John McLean, Ohio; (Jackson), com. Mar. 7, 1829; d. Apr. 4, 1861; int. Spring Grove, Cincinnati, O.

Henry Baldwin, Pa.; (Jackson), com. Jan. 6, 1830; d. Apr. 21, 1844; int. Greendale Cemetery, Meadville, Pa.

James M. Wayne, Ga.; (Jackson), com. Jan. 9, 1835; d. July 5, 1867; int. Laurel Grove Cemetery, Savannah, Ga.

Philip P. Barbour, Va.; (Jackson), com. Mar. 15, 1836; d. Feb. 25, 1841; int. Congressional Cemetery, Washington, D. C.

*William Smith, Ala.; (Van Buren), com. Mar. 8, 1837; d. June 26, 1840.

John Catron, Tenn.; (Van Buren), com. Mar. 8, 1837; d. May 30, 1865; int. Mount Olivet Cemetery, Nashville, Tenn.

John McKinley, Ala.; (Van Buren), com. Apr. 22, 1837; d. July 19, 1852; int. Cave Hill Cemetery, Louisville, Ky.

Peter V. Daniel, Va.; (Van Buren), com. Mar. 3, 1841; d. June 30, 1860; int. Hollywood Cemetery, Richmond, Va.

Samuel Nelson, N. Y.; (Tyler), com. Feb. 13, 1845; res. Nov. 28, 1872; d. Dec. 13, 1873; int. Lakewood Cemetery, Cooperstown, N. Y.

Levi Woodbury, N. H.; (Polk), com. Sept. 20, 1845; d. Sept. 4, 1851; int. Harmony Grove Cemetery, Portsmouth, N. H.

Robert C. Grier, Pa.; (Polk), com. Aug. 4, 1846; res. Jan. 31, 1870; d. Sept. 26, 1870; int. West Laurel Hill Cemetery, Philadelphia, Pa.

Benj. R. Curtis, Mass.; (Fillmore), com. Sept. 22, 1851; res. Sept. 30, 1857; d. Sept. 15, 1874; int. Mount Auburn Cemetery, Cambridge, Mass.

John A. Campbell, Ala.; (Pierce), com. Mar. 22, 1853; res. May 21, 1861; d. Mar. 13, 1889; int. Greenmount Cemetery, Baltimore, Md.

Nathan Clifford, Maine; (Buchanan), com. Jan. 12, 1858; d. July 25, 1881; int. Evergreen Cemetery, Portland, Maine.

Noah H. Swayne, Ohio; (Lincoln), com. Jan. 24, 1862; res. Jan. 24, 1881; d. June 8, 1884; int. Oak Hill Cemetery, Washington, D. C.

Samuel F. Miller, Iowa; (Lincoln), com. July 16, 1862; d. Oct. 13, 1890; int. Oakland Cemetery, Keokuk, Iowa.

David Davis, Ill.; (Lincoln), com. Oct. 17, 1862; res. Mar. 4, 1877; d. June 26, 1886; int. Evergreen Cemetery, Bloomington, Ill.

Stephen J. Field, Calif.; (Lincoln), com. Mar. 10, 1863; res. Dec. 1, 1897; d. Apr. 9, 1899; int. Rock Creek Cemetery, Washington, D. C.

Edwin M. Stanton, Pa.; (Grant), com. Dec. 20, 1869; to take effect Feb. 1, 1870; d. Dec. 24, 1869, before com. took effect.

William Strong, Pa.; (Grant), com. Feb. 18, 1870; res. Dec. 14, 1880; d. Aug. 19, 1895; int. Charles Evans

Cemetery, Reading, Pa.

Joseph P. Bradley, N. J.; (Grant), com. Mar. 21, 1870; d. Jan. 22, 1892; int. Mount Pleasant Cemetery, Newark, N. J.

Ward Hunt, N. Y.; (Grant), com. Dec. 11, 1872; res. Jan. 7, 1882; d. Mar. 24, 1886; int. Forest Hill Cemetery, Utica, N. Y.

John M. Harlan, Ky.; (Hayes), com. Nov. 29, 1877; d. Oct. 14, 1911; int. Rock Creek Cemetery, Washington, D. C.

William B. Woods, Ga.; (Hayes), com. Dec. 21, 1880; d. May 14, 1887; int. Cedar Hill Cemetery, Newark, Ohio.

Stanley Matthews, Ohio; (Garfield), com. May 12, 1881; d. Mar. 22, 1889; int. Spring Grove Cemetery, Cincinnati, Ohio.

Horace Gray, Mass.; (Arthur), com. Dec. 20, 1881; d. Sept. 15, 1902; int. Mount Auburn Cemetery, Cambridge, Mass.

Samuel Blatchford, N. Y.; (Arthur), com. Mar. 22, 1882; d. July 7, 1893; int. Greenwood Cemetery, New York, N. Y.

*Roscoe Conkling, N. Y.; (Arthur), com. Feb. 1882; d. Apr. 18, 1888.

Lucius Q. C. Lamar, Miss.; (Cleveland), com. Jan. 16, 1888; d. Jan. 23, 1893; int. Riverside Cemetery, Macon, Ga.; reint. St. Peters Cemetery, Oxford, Miss.

David J. Brewer, Kans.; (Harrison), com. Dec. 18, 1889; d. Mar. 28, 1910; int. Mount Muncie Cemetery, Leavenworth, Kans.

Henry B. Brown, Mich.; (Harrison), com. Dec. 29, 1890; res. May 28, 1906; d. Sept. 4, 1913; int. Elmwood Cemetery, Detroit, Mich.

George Shiras, Jr., Pa.; (Harrison),

com. July 26, 1892; res. Feb. 23, 1903; d. Aug. 2, 1924; int. Allegheny Cemetery, Pittsburgh, Pa.

Howell E. Jackson, Tenn.; (Harrison), com. Feb. 18, 1893; d. Aug. 8, 1895; int. Mount Olivet Cemetery, Nashville, Tenn.

Edward D. White, La.; (Cleveland), com. Feb. 19, 1894; res. Dec. 19, 1910, to become Chief Justice; d. May 19, 1921; int. Oak Hill Cemetery, Washington, D. C.

Rufus W. Peckham, N. Y.; (Cleveland), com. Dec. 9, 1895; d. Oct. 24, 1909; int. Rural Cemetery, Albany, N. Y.

Joseph McKenna, Calif.; (McKinley), com. Jan. 21, 1898; res. Jan. 5, 1925; d. Nov. 21, 1926; int. Mount Olivet Cemetery, Washington, D. C.

Oliver Wendell Holmes, Mass.; (T. Roosevelt), com. Dec. 4, 1902; res. Jan. 12, 1932; d. Mar. 6, 1935; int. Arlington Cemetery, Arlington, Va.

William R. Day, Ohio; (T. Roosevelt), com. Feb. 23, 1903; res. Nov. 13, 1922; d. July 9, 1923; int. Westlawn Cemetery, Canton, Ohio.

William H. Moody, Mass.; (T. Roosevelt), com. Dec. 12, 1906; res. Nov. 20, 1910; d. July 2, 1917; int. Byfield Cemetery, Georgetown, Mass.

Horace H. Lurton, Tenn.; (Taft), com. Dec. 20, 1909; d. July 12, 1914.

Charles Evans Hughes, N. Y.; (Taft), com. May 2, 1910; res. June 10, 1916; com. Chief Justice Feb. 13, 1930 (Hoover).

Willis Van Devanter, Wyo.; (Taft), com. Dec. 16, 1910; ret. June 2, 1937.

Joseph Rucker Lamar, Ga.; (Taft), com. Dec. 17, 1910; d. Jan. 2, 1916; int. Old Summerville Cemetery, Augusta, Ga.

Mahlon Pitney, N. J.; (Taft), com.

Mar. 13, 1912; ret. Dec. 31, 1922; d. Dec. 9, 1924; int. Evergreen Cemetery, Morristown, N. J.

James C. McReynolds, Tenn.; (Wilson), com. Aug. 29, 1914.

Louis D. Brandeis, Mass.; (Wilson), com. June 1, 1916; ret. Feb. 13, 1939.

John H. Clarke, Ohio; (Wilson), July 24, 1916; res. Sept. 18, 1922.

George Sutherland, Utah; (Harding), com. Sept. 5, 1922; ret. Jan. 18, 1938.

Pierce Butler, Minn.; (Harding), com. Dec. 21, 1922; d. Nov. 16, 1939; int. Calvary Cemetery, St. Paul, Minn.

Edward T. Sanford, Tenn.; (Harding), com. Jan. 29, 1923; d. Mar. 8, 1930; int. Greenwood Cemetery, Knoxville, Tenn.

Harlan F. Stone, N. Y.; (Coolidge), com. Feb. 5, 1925.

Owen J. Roberts, Pa.; (Hoover), com. May 20, 1930.

Benjamin N. Cardozo, N. Y.; (Hoover), com. Mar. 2, 1932; d. July 9, 1938; int. Congregation Cemetery, Cypress Hills, Long Island, N. Y.

Hugo L. Black, Ala.; (F. D. Roosevelt), com. Aug. 18, 1937.

Stanley F. Reed, Ky.; (F. D. Roosevelt), com. Jan. 27, 1938.

Felix Frankfurter, Mass.; (F. D. Roosevelt), com. Jan. 20, 1939.

William O. Douglas, Conn.; (F. D. Roosevelt), com. Apr. 15, 1939.

Frank Murphy, Mich.; (F. D. Roosevelt), com. Jan. 18, 1940.

Com. = Commissioned. D. = Died. Ret. = Retired. Res. = Resigned. Int. = Interment. Reint. = Reinterment.

*Denotes that appointee declined appointment, did not take the oath of office, and never became a member of the Court.

NOTE.—Names in parentheses indicate President making the appointment.

TRADITION AND JUDICIAL REVIEW

BY KENNETH C. UMBREIT

of the New York Bar; author of "Our Eleven Chief Justices"

THE existence of a written instrument called a constitution tends to obscure the fact that our government is almost as much one of tradition—that is, precedent—as is the British. We all know the vast growth of little phrases such as "to regulate commerce . . . among the several States." The precedent portion of our government is not limited to the interpretation of the phraseology of the constitution. Where do we find an explicit power in the constitution to acquire territory? We do know that Jefferson thought his purchase of Louisiana was unconstitutional and wanted it ratified by a constitutional amendment. No aspect of our government depends more on tradition and less on the wording of the constitution than the judiciary.

The constitution reveals on its face that the judiciary was not the portion of the proposed government which engaged the greatest attention in

the Convention. The procedure for the impeachment of the President provides, for example, that the Chief Justice is to preside at the trial. There is no other mention in the constitution of such an officer and it might properly be said that the office of Chief Justice exists only by implication. The judiciary article itself can best be described as scanty.

Convention Expected Supreme Court to Be the Interpreter of the Constitution

I am not going to discuss the question whether the members of the Convention intended to give to the judiciary power to declare acts of congress unconstitutional. The evidence is overwhelming that in some vague way the Supreme Court was to act as the interpreter of the constitution. It is

equally clear that no one had any definite idea how it was going to perform that function.

Jay, the first Chief Justice, had faced the same problem in another form some years before. He had then acted as the draftsman of the first constitution of New York and had invented a governmental device of which he was immensely proud. This was the Council of Revision, which included the principal judicial officers of the state in its membership. Its powers were a sort of cross between executive veto and judicial review. The provision of a similar device in the federal constitution had been discussed in the convention and had been rejected only after long consideration. John Rutledge, who was to succeed Jay as Chief Justice, was its principal opponent. His opposition was based on the very lawyerlike argument that "the Judges ought never to give their opinion on a law till it comes before them." That seems to us the natural lawyer's reaction to such a scheme, but John Adams—than whom there was no better lawyer in the United States—had provided in the constitution which he drafted for Massachusetts for the giving of advisory opinions by the judiciary to the legislature.

Possibility of a "Council of Revision"

Despite this rejection, it would not have been surprising to see something very similar to the Council of Revision arise under the federal constitution. Washington called the judiciary "the keystone of our political fabric," but his ideas of judicial independence were very different from what we understand by that term. All these phrases such as "judicial review" and "judicial independence" are capable of a number of equally valid interpretations. At one time during his administration Washington asked for the written opinions of the judges of the Supreme Court. It is safe to assume that this request met with the approbation of both Jefferson and Hamilton, for Washington did nothing without consulting his cabinet, and when he consulted them he treated them more as colleagues than as assistants. The judges refused to give the requested opinions. In what a different direction our constitutional system would have developed if they had given them! The presidential veto was lying around waiting for precedent to establish its true function. Was it legislative or judicial? Should the President veto a law only when he thought it unconstitutional, or should he also veto it when he thought it unwise? Should he request the opinions of the judges of the Supreme Court before using it? It was over forty years before it became apparent that the presidential veto was to be interpreted as legislative. If Jay and his colleagues had been more responsive to Washington's advances a different situation might have arisen. If a custom had been developed of close consultation between the President and the judges of the Supreme Court, something very similar to the New York Council of Revision could easily have come into being.

There was no popular objection to the power of the judiciary. The axiomatic premise of the average man today is that government exists to improve his economic position; the axiomatic premise of the average American in the eighteenth century was that government was a necessary evil. "I do not believe," wrote Jefferson, "that fourteen out of fifteen men are rogues. . . . But I have always found that rogues would be [that is, are resolved to be] uppermost, and I do not know that the proportion is too

strong for the higher orders, and for those who, rising above the swinish multitude, always contrive to nestle themselves into the places of power and profit."

Only Question Was How to Make Judicial Review Effective

When the federal constitution was adopted there was no question in the United States that judicial review was desirable; the question was how to make it effective. The major premise in all political discussion was the danger of power. This fear that power would inevitably be abused had led to the lifeless government of the Confederation. The constitution represented the reaction from that unsuccessful experiment, and the fear of its opponents was that it had gone to the other extreme. "Yes, sir," said Patrick Henry in the Virginia ratifying convention, "our judges opposed the acts of the legislature. . . . They had the fortitude to declare that they were the judiciary and would oppose unconstitutional acts. Are you sure your federal judiciary will act thus?"

The question of how to make limitations on power effective was approached from two extremes. One is set forth in a three-volume work by John Adams. His answer was that it could only be done by a "balance." "It has been said," he wrote, "that it is extremely difficult to preserve a balance. This is no more than to say that it is extremely difficult to preserve liberty." The judiciary played no part in his balance. He insisted on the usual safeguards of tenure and salary but it is quite evident from his silence that he did not believe any judiciary would ever attain sufficient power to be an important weight in the maintenance of a balance of power.

Somewhat ironically, in view of what was to happen during his presidency, Jefferson was at the other extreme. One of his objections to the federal constitution was that the veto power had not been lodged in a council of which the judges were members. The draft of a state constitution which he prepared went further than any constitution ever actually adopted in America in vesting powers in the judiciary. A year before the meeting of the federal convention he assured a Frenchman that in America "the judges would consider any law as void which was contrary to the constitution." He thought it important for the people to provide for these checks "while yet they have honest representatives," for the people "should look forward to a time . . . when a corruption . . . will have seized the heads of government, and be spread by them through the body of the people; when they will purchase the voices of the people, and make them pay the price."

Supreme Court Has Furnished the Balance Sought by Jefferson and John Adams

We all know that, on the whole, it is the Supreme Court which has furnished that balance which Jefferson and Adams sought. The balance which Adams expected between two branches of the legislature and between the legislature and the executive has not been nearly so effective. Yet his assumption of the essential weakness of the judiciary as a balancing force seems sound. It still remains true that the judiciary has no "power." Its strength is a moral strength and its nearest historical parallel is the strength of the Church in the early middle ages. No higher tribute can be paid to the men who have worn its robes.

ABRAHAM LINCOLN AND THE STATEHOOD OF NEVADA

On Close Division of Public Opinion in 1864 a New Free State was Important—Decision to Admit Nevada—Great Hopes for Future Expansion—New Constitution Telegraphed to Washington in Time to Proclaim State and Have its Vote Cast in Presidential Election.

BY F. LAURISTON BULLARD
Editorial Writer, Boston Herald

ON the wall of the Assembly Chamber in the capitol of the State of Nevada there hangs a portrait of Abraham Lincoln. Its acquisition was authorized by the Legislature in connection with the celebration of the semi-centennial of Nevada's statehood. The unveiling took place on March 14, 1915. The painting was placed above the Speaker's chair in the room occupied by the popular branch of the Legislature in commemoration of the events that brought about the admission of Nevada to the Union, and, as the Governor said, "to inspire legislators to give to the people the best that is in them." The anniversary of Nevada's accession (October 31, 1864) is observed annually as a holiday with more or less formality, and last year was celebrated with the pageantry of a Diamond Jubilee.

"Nevada or a Million Men"

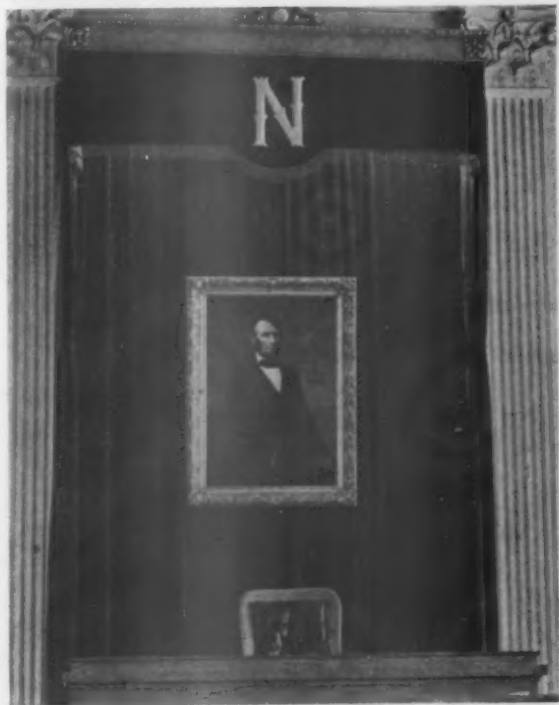
That the admission of the Silver State was considered a necessity for the consummation of the policies of the Civil War President is well known, but several important aspects of the situation at the time are hardly known at all. "Easier to admit Nevada than to raise another million men," is the familiar explanation of Lincoln's policy, this on the authority of the account given to the public in 1898 by Charles A. Dana. The purpose of this article is to bring forward certain neglected phases of the story and to indicate that the Dana account may not in all respects be accurate.

During about half of the decade of the 1850's Carson County, in the western part of the Territory of Utah, was occupied only by several groups of Mormons, and emigrants bound for California hurried through what seemed to them a Valley of Death littered as was the trail by skeletons of cattle and men. When a clash between the United States and the Mormon authorities became imminent in 1857, about a thousand Zionists at the call of Brigham Young abandoned promptly the properties in the Valley which their labor had made valuable and hastened back to Salt Lake. The discovery of the Comstock Lode precipitated a wild rush for a new El Dorado. On the second day before he quit the Presidency, James Buchanan signed the Act which transformed Carson County into the Territory of Nevada. In fewer than four years the Territory was advanced to Statehood. The census of 1860 gave Nevada a population of only 6,857. During the debate in Congress of the Enabling Act for Nevada's admission the population was estimated all the way from 30,000 to 45,000. Statehood must mean the addition of two Senators and one Representative to the National Legislature. The Apportionment Act in force at that time established a population ratio of 127,381 for each member of Congress. In all the succeeding 75 years Nevada never has attained that population.

But in the middle 60's everybody assumed that Nevada was destined to become a populous and wealthy State. The frenzied speculation of the wildcat era was subsiding, but sane observers in conservative publications declared that a mighty commonwealth had been founded on the plateau between the Rockies and the Sierras and predicted that the stream of bullion which would issue from its mines would pay the nation's war debt. Senator Latham of California insisted that even by the time the Territory had qualified for admission the population would exceed 100,000, whereas the Golden State had come in with a population no larger. The eastern newspapers were commenting on the great progress the Territory had made in four years. The *New York Times* stressed "the vast multitudes of emigrants" who were pouring into the region. The *New York Herald* foresaw a "future for the new State" that would be as prosperous as its beginning. Greeley's *Tribune* described in glowing terms the prospects of the coming State, and indicated that its mines might pay not only the interest on the national debt but "the entire debt . . . within the present generation." The Secretary of the Interior in his report for 1864 conceived that the production of the silver regions "must soon reach a magnitude unprecedented in the history of mining operations." Bishop Matthew Simpson indulged in gaudy rhetoric to describe the value of the Nevada mines—"the more the mines are worked the richer they yield." Observers believed also that once the Pacific Railroad should have spanned the Continent silver would not be the only valuable export of the new State. Agriculture must always be limited, but several minerals would supplement silver when the mines became more readily accessible and freight rates receded to a reasonable level.

Nevada Desired Statehood

The people of Nevada wanted to enter the Union. Three months before Congress passed an Enabling Act they voted four to one for Statehood. During the territorial years a little body of troops organized in that distant region kept open the sole means of communication between the East and the Pacific coast. For that valuable war service the Territory borrowed money at the rate of 1½ per cent. per month and incurred a debt for which the State was not reimbursed until 1929. The government at Washington under all normal conditions would have delayed action. Nobody foresaw, however, that Nevada would provide the nation with a unique case of arrested development. Nevertheless, even though the future had been clearly disclosed to the Administration, Statehood would have been authorized without delay. The Administration was looking for additional loyal States. Congress passed Enabling Acts for Colorado and Nebraska, territories which also fell far short



This portrait of Abraham Lincoln hangs above the Speaker's Chair in the Assembly Chamber in the State House at Carson City.

It was painted by Charles W. Shean, New York City, and authorized by the Nevada Legislature at the time of the celebration of the 50th Anniversary of Statehood.

Thus Nevada emphasizes Lincoln's connection with the admission of the State at a critical time in the Civil War.

of the apportionment population. To expedite the admission of Nevada its constitution was telegraphed entire from Carson City to Washington a few days before the national election of 1864. The people of the Territory probably understood only in part the reasons for the hurry.

Prior to the organization of the territorial government midway of 1861 there was little government or none in Carson County. Conditions in that portion of Utah were hopelessly chaotic. During one period three governments are said to have tried simultaneously to function. The discovery of the Comstock on June 12, 1859, on the eastern slope of Mount Davidson, about twenty miles from the California boundary, made confusion worse confounded. In a short time Virginia City multiplied from nothing to a hurly-burly of 10,000 miners. San Francisco was the centre of the orgy of speculation that followed. A government report states that 3000 silver companies were organized in the California city and that 30,000 persons bought stock in them. "The amount of business done in Virginia City was twice as great as in any other town of equal size in the United States. It provided more silver in a year than any other mining district of equal size ever did." Other silver ledges were soon uncovered and other little camps became wild and unruly towns.

Terry and Stewart; Mark Twain

Within two days of each other there arrived in Car-

son City two men who represented opposing ideas of what should be the destiny of that region. Judge David S. Terry, born in Kentucky, had resigned as Chief Justice of the California Supreme Court shortly before his duel with Senator David Broderick. He came to Virginia City, according to the not too reliable charge of a San Francisco newspaper, "at the request of Jefferson Davis from whom he had received a commission to be territorial governor of Nevada in case it became sympathetic with the southern cause." In 1863 he joined the Confederate army and fought at Chickamauga. William M. Stewart, who was to become one of Nevada's first Senators, born in New York, was an ardent Unionist. After ten years in California he established a law office in Nevada and became a specialist in mining law. He spent four years in vindicating the interests of the original claimants to the Comstock. In that turbulent period he rode the storm, with Terry as his usual opponent until the outbreak of the war.

The organization of Carson County as the Territory of Nevada was expected to end what was plainly an impossible situation. There was an interval of eighteen weeks between the President's approval of the bill creating the new Territory and the arrival of its first and only Governor. James W. Nye doubtless owed his appointment to his friend, the Secretary of State. The younger Charles Francis Adams, who traveled with him and Seward on a campaign tour in the Middle West in 1860, described Nye as an able stump speaker and politician, well adapted for the life of the mining camps, and "a character!" In his annual message of 1862 President Lincoln referred to Nevada as a region in which "the Federal officers" on their arrival there "found existing the leaven of treason," a condition with which Nye was amply equipped to deal. As Secretary for the Territory, another Cabinet member, Attorney General Bates, obtained the appointment of one Orion Clemens, who in turn named as his secretary his brother, Sam, whom the world knows as Mark Twain.

During more than two years of the three years and four months that Nevada remained a Territory the question of Statehood was agitated. In 1862 the Territorial Legislature passed a bill for a referendum vote, and for the election of delegates for a constitutional convention in case Statehood should win. In a total vote of 8162 only 1502 were recorded in opposition. Late in December of that year Representative James M. Ashley introduced in Congress a bill providing for the admission of Nevada. Precisely in the same form he offered on the same day bills in behalf of Colorado, Nebraska, and Utah, and a bill for a temporary government for Idaho. These measures encountered long delay in the House, but the Senate passed the Nevada Act in March, 1863. Nevada duly elected the convention delegates and they spent about six weeks towards the end of the year in drafting a constitution. And then, for reasons which will appear, in January, 1864, the people rejected it by a four-to-one vote, 8851 to 2157.

Territory Faithful to Union

Meantime in more ways than one the Territory was demonstrating its fidelity to the Union. The people always have been proud of what Nevada did for the Sanitary Commission, the Red Cross of Civil War days. Its per capita contributions were larger than those of any other State or Territory, despite the fact that there was a good deal of secession sentiment in Carson City and Virginia City. Nevada's greatest service was the keeping open of the Overland Trail. The Federal Govern-

ment early in 1861 withdrew all troops from the Pacific coast, except one regiment of infantry and three batteries of artillery. The blockade and other activities at sea reduced heavily the roundabout services between the coasts via Panama. The Southern Trail, through Texas, Arizona and New Mexico, was in the hands of the Confederacy. Only the Overland was left. The daily mail service over that route between the Missouri River and Sacramento remained as a vital link of communication. This was the covered wagon trail. Moreover, its discontinuance might have meant the shutting down of the mines. Those mines, during the war and the years immediately following, produced for the government \$500,000,000.

In this situation three separate demands came from Washington for the Territory to equip and mount, subsidize and pay, a body of troops for the policing of several hundreds of miles of a trail which was exposed to the raids of bandits and Indians. Nevada kept the Overland open. About 1180 men were recruited for three-year service and many besides volunteered for home guard duty. They kept that vast region in touch with the East. The Territory borrowed the money to pay these troops and the State assumed the debt. This constituted a reimbursement claim, the justice of which was conceded for years by the Congressional committees that examined it, but which was not finally allowed and paid until ten years ago. The State then received approximately \$595,000, of which only \$110,000 represented the original principal.

From this record the great majority of the people derived great satisfaction. They had suppressed secession, kept the Overland clear, and contributed handsomely for humanitarian funds. When the transcontinental telegraph line closed the last gap and completed the line from coast to coast the Territorial Legislature sent a message to President Lincoln declaring that "the last-born of the Nation will be the last to desert the flag."

Mining Titles Doubtful

One reason for seeking statehood seldom appears in the record. Many mine owners were none too sure of the legality of their titles. The mining policy of the Federal government was still unsettled. There was no national mining code. Large sums were available for the development of the industry if and when investors could be sure that their property rights would withstand challenge in the courts. Law suits, next to silver, were Nevada's biggest crop, and a most profitable source of revenue for lawyers. Judges who received relatively minute salaries were sitting in cases involving rights worth millions of dollars. Dr. Mack, the historian of Nevada, states that the territorial judiciary was "corrupt," that many of the judges were "susceptible to outside influences." Amidst a mania for the organization of corporations, Mark Twain is suspected of the authorship of the quip in a San Francisco newspaper that "if two men sit down here to play cards they incorporate the game." The people believed that condition could not be corrected under the territorial system. They considered representation in Washington on a parity with the other States to be essential for their protection. Mining questions during that time were under active debate in Congress.

Why then did the people reject the Constitution which their representatives had prepared? The man responsible beyond all others for its rejection was none

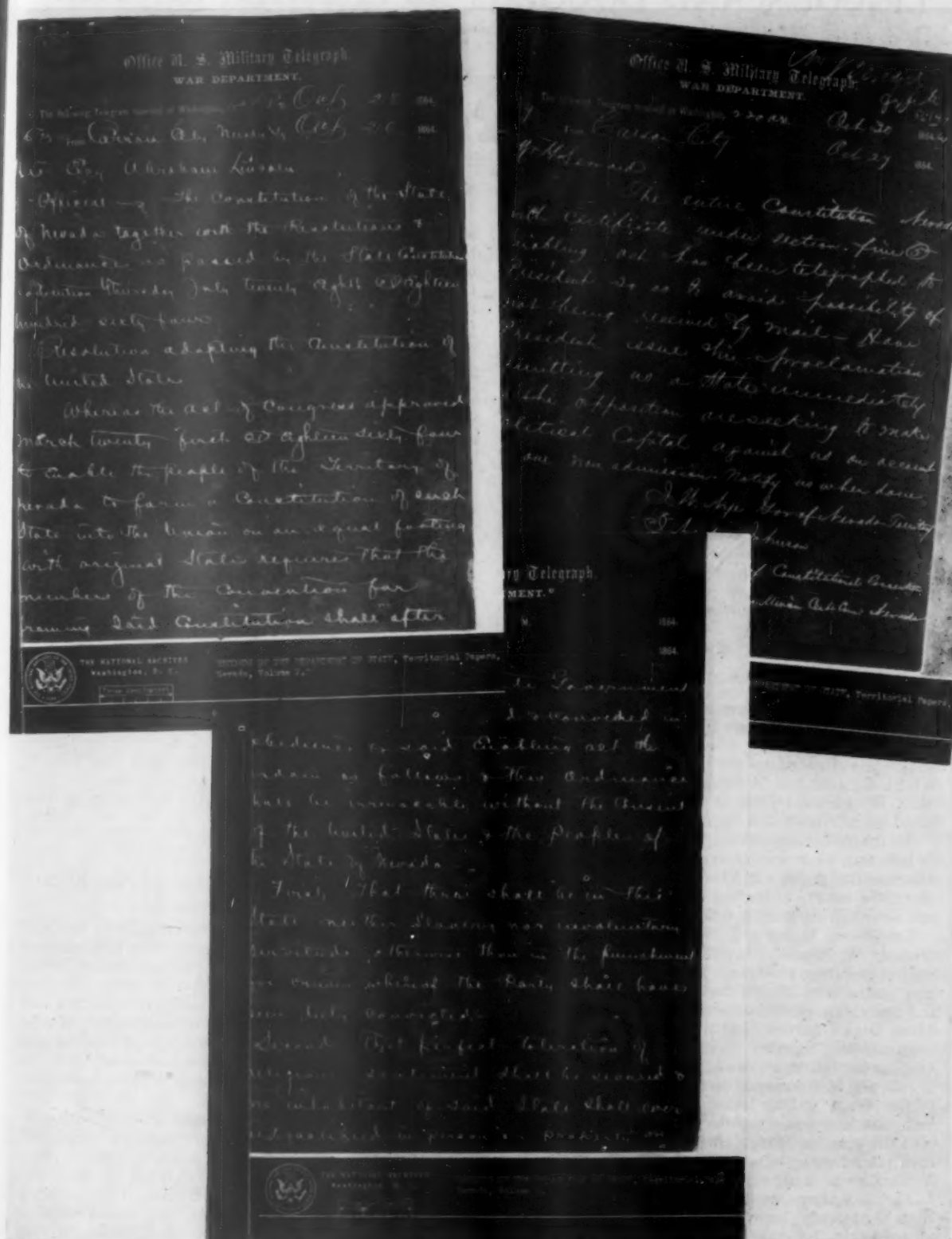
other than William M. Stewart. He served in the convention as chairman of the judiciary committee. Certain taxation clauses he considered obnoxious, and when his amendment for their rectification was rejected by the convention he unlimbered all his formidable artillery against the projected Constitution. He rang all the changes on the charge that it would "tax the poor miner out of existence." It would kill the mining industry because it would tax the miner's shafts and drifts and bedrock tunnels whether these were productive or not. At least one historian, Hubert Howe Bancroft, pronounces this a "pretext," but without stating his reasons.

Abraham Lincoln and Nevada, 1864

A second attempt to qualify for statehood was more successful. It was more than a movement by local initiative. It was instigated also from Washington. The party in power needed Nevada. The president wanted its aid for achieving an amendment to the Federal Constitution that should end the existence of slavery beyond all argument or cavil. Congress having passed a statehood act, Governor Nye called another convention to meet on July 4. The taxation clauses were omitted. Stewart mobilized all his powers to procure the adoption of this instrument, and the people did ratify it in early September.

In this story of the relations between Abraham Lincoln and Nevada, 1864 is the crucial year. The sequence of events is of the first importance for understanding what happened. A paragraph of dates should be useful. In that year Nevada voted five times. On January 19 the people rejected one Constitution and on September 7 they accepted another. They chose the delegates for the second convention; they elected certain territorial officers, and in turn they elected the officers who would take over the affairs of the new state. Meantime the other half of the drama was under way in Washington. Ashley in the House had offered a resolution for an abolition amendment on December 14, 1863. Abolition amendments were proposed in the Senate on January 11, 1864, and the Committee on the Judiciary reported what became the Thirteenth Amendment on February 1. On February 24 the Senate passed a bill for Nevada's admission providing that a constitution should be submitted to the people on October 11. The House passed this bill on March 17 and Lincoln signed it four days later. The abolition amendment passed the Senate, 38 to 6, on April 8. In May both Houses passed an amendment to the Nevada Enabling Act changing the date for the people to vote on their proposed Constitution from October 11 to September 7. Lincoln added his signature to this bill on May 21. On June 15 the House failed to muster the necessary two-thirds vote for a suspension of the rules in behalf of the abolition amendment and the Ashley motion for reconsideration was allowed to lie on the Speaker's desk. In July the Nevada convention met, and the people duly adopted the new Constitution in September. The Enabling Act contained an emergency provision that the Constitution should be submitted to the President, and that he thereupon should proclaim Nevada a State. That proclamation he issued on October 31. The Presidential election followed on November 8. Ashley called up his reconsideration motion on January 31, 1865, and that day the abolition amendment passed the House 119

(Continued on page 236)



Sheets from telegram transmitting constitution of Nevada, October, 1864. Telegram to Seward above, right; first sheet at left; below, sheet prohibiting slavery.

LINCOLN AND DOUGLAS AS COUNSEL ON THE SAME SIDE

BY HARRY E. PRATT

of Springfield, Illinois; Executive Secretary, Abraham Lincoln Association

STUDENTS of the life of Abraham Lincoln, long familiar with his opposition to Stephen A. Douglas on the political stump from 1839 to 1858 and their frequent appearance on opposite sides in the Sangamon Circuit and Illinois Supreme courts, are always interested in the facts of the one case that has come to light in which Lincoln and Douglas appeared together as attorneys for the defense of a man accused of murder, at Clinton, Illinois. In the case of *The People v. Spencer Turner*, tried at the May, 1840, term of the Circuit court of DeWitt county, Lincoln, Douglas, and Kirby Benedict, of Decatur, defended Turner, at that time not yet twenty-one years of age, on the charge of beating to death a man named Matthew K. Martin.

Douglas had practiced law while serving as Register of the Springfield Land Office from 1837 to 1839, and prior to that he had served two years as State's Attorney for the First Circuit. In the spring of 1840, however, he was not going around the new Eighth Circuit in the interest of the law, but to engage in forensic encounters with Lincoln, the Whig elector, at each county seat town. They had already presented the issues of the Harrison against Van Buren campaign at the three county seats of Tremont, Bloomington, and Pontiac before their arrival in Clinton.

Business in Court, Then a Lincoln-Douglas Debate

The second court to meet in the newly formed County of DeWitt convened at Clinton on Thursday, the twenty-first day of May, 1840. The necessary business being soon attended to, the debate opened between the Whigs, Lincoln and William L. May, and the Democrats, Douglas and Jesse B. Thomas. This encounter lasted all afternoon and late into the evening.

On the following morning the grand jury returned an indictment for murder against Spencer Turner, who was then free under a \$10,000 bond. Talking with their client, the attorneys for the defense, Lincoln, Douglas, and Benedict, elicited the following story of the murder:

Turner and Matthew K. Martin had apparently been drinking together on May fifteenth, and after a violent quarrel had come to blows. The verdict of the coroner's jury stated that Martin had been found in a helpless and speechless condition with a gash in his head, near Miles Gray's garden, and that his death had resulted from a blow, together "with his own imprudence in keeping himself in a state of intoxication and exposure in rain and inclemency of weather on the night previous to his death." Dr. James Brown and Dr. Thomas Laughlin had served on the coroner's jury and examined the gash on Martin's head. Eight witnesses were each placed under one hundred dollar bond to appear in the Circuit court in the case of *People v. Turner*.

The indictment as drawn by D. B. Campbell, the State's Attorney, recited that Turner "with his malice aforethought did make an assault upon Martin with a certain wooden stick of the value of ten cents upon the right side of the head near the right temple one mortal wound of the length of two inches and of the depth of one inch."

Murder Trial: Lincoln and Douglas for the Defense

On the morning of May twenty-third, ten jurymen were chosen from the panel and two from the bystanders in the crowded court room and the trial began. Turner pleaded not guilty. Though we do not know what arguments Lincoln and Douglas used in his defense, it is safe to assume that they dwelt upon his youth and the drunken condition of Martin at the time of his death as well as his hours of exposure in the rain. The witnesses upon examination probably admitted Martin's general reputation for drunkenness. The jury brought in a verdict of not guilty, bearing mute witness to Governor Ford's comment that "There was now and then an indictment for murder . . . but in all cases of murder arising from heat of blood or in fight, it was impossible to convict."

Acquittal: Attorneys' Fees

Douglas is reported to have received a fee of \$200 which was paid at once, and Lincoln to have some time later received a horse which soon went blind. Concerning Douglas' fee we have no record, but we do know that the horse story is untrue. Lincoln received a ninety-day note for \$200, signed by Turner and his brother William. A year and a half later, the note being unpaid, Lincoln brought a damage suit for \$300 against the Turners. Spencer's defense that he was under age when the note was signed was disregarded by the court and judgment awarded to Lincoln against Spencer Turner for \$213.50 and costs. William Turner was later made a party to the judgment, but Lincoln does not appear to have pressed either of them for payment, since the case was continued from term to term until April, 1846.

Address of Hon. Robert H. Jackson

(Continued from page 204)

trifugal and centripetal, and whose struggle he declared made up most of history. The judgments and opinions of this Court deeply penetrate the intellectual life of the nation. This Court is more than an arbiter of cases and controversies. It is the custodian of a culture and is the protector of a philosophy of equal rights, of civil liberty, of tolerance, and of trusteeship of political and economic power, general acceptance of which gives us a basic national unity. Without it our representative system would be impossible.

Lord Balfour made an observation about British government, equally applicable to American, and expressed a hope that we may well share, when he wrote:

"Our alternating Cabinets, though belonging to different parties, have never differed about the foundation of society, and it is evident that our whole political machinery presupposes a people so fundamentally at one that they can afford to bicker; and so sure of their own moderation that they are not dangerously disturbed by the never-ending din of political conflict. May it always be so."

LEGAL SERVICE FOR LOW INCOME GROUPS IN SWEDEN

Study of Municipal Scheme for Law at Low Cost—Wide Social Distribution of Use and Benefit of Plan—Comparison of Stockholm Arrangements with Legal Aid in Milwaukee.

BY LLOYD K. GARRISON

Dean of the Law School, University of Wisconsin; Member of President Roosevelt's Commission on Industrial Relations in Great Britain and Sweden, 1938

WHEN I was in Sweden two summers ago I became interested, through conversations with certain Swedish lawyers, in not the least remarkable feature of that remarkable little country—its generous and novel provisions for enabling people of small means to obtain adequate legal service both in litigated and non-litigated matters.

As I pursued the subject further, it seemed to me that we had much to learn from the Swedish experience, in this as in other fields. I gathered what material I could, all of it authoritative, but was unable to make a personal and first-hand investigation of the social and political background, and the day-to-day operation, of the laws and institutions described below. I know that without such an investigation many questions must remain unanswered and that many overtones will be missed. On the other hand, I am persuaded that the materials available throw sufficient light on the Swedish system, and are sufficiently suggestive for purposes of comparison with our own system (or lack of it), to warrant study by all who are concerned with the legal problems of low-income groups in this country.

These problems are dealt with in Sweden in two ways: by the Free Legal Proceedings Act of 1919, and by the so-called Public Institutes for Legal Assistance, which correspond to our legal aid bureaus, but which serve a much broader group in the community.

I. The Free Legal Proceedings Act of 1919

This Act¹ empowers the courts to exempt a party, under certain conditions, from all the costs of litigation (whether in civil or criminal proceedings), including even the costs of serving process, of witness fees, and of executing judgments. And, in addition, the court may order that the fees of the party's attorney be defrayed by the State in an amount to be fixed by the court as "reasonable," and that the attorney's disbursements for "necessary" expenses be similarly defrayed.² In such cases the party is permitted to select his own attorney, "if there are no special reasons why he should not be allowed to do so"; but the attorney is prohibited from accepting any payment from the party in addition to that fixed by the court.

By these provisions a litigant, plaintiff or defendant, if his circumstances warrant assistance, is enabled to go through a law-suit in the trial courts without a single penny of expense. The same free procedure may be granted also in all of the higher courts, with the exception that if a party takes an appeal from an adverse judgment the fees of his attorney will not be paid by the state unless his position is essentially sustained.

Of the two principal features of the Act the one

relieving poor litigants of costs and expenses appears to be more important in practice than the one permitting the retention of attorneys to be paid by the state. For the Public Institutes for Legal Assistance, to be later described, conduct through their salaried staffs most, if not all, of the litigation on behalf of poor people in the localities where they have been set up. Indeed one of the objects of the creation of these institutes was to relieve the poor so far as possible of the necessity of seeking private counsel at state expense because of the disadvantages to the clients as well as the burdens imposed on the state. As the Royal Social Board has pointed out:

"A private lawyer always chooses the better situated as his principal clients. As soon as he is independent of poor persons' cases with their regulated remuneration, he drops them. There may be a danger, therefore, of the work falling into the hands of less desirable persons. Moreover, the private lawyer is in many cases, both personally as well as from a legal point of view, somewhat unfamiliar with some questions that concern the living conditions of the masses. Nor would it be desirable, from an economic point of view, for the Treasury to engage private lawyers in the numerous minor cases that cannot conveniently be dealt with . . . without special counsel."

Nevertheless, there are localities not served by the Institutes where the provision for attorneys' fees must be of some importance, and even in localities where the Institutes exist there appears to be nothing in the law to prevent a poor litigant from bringing his case without application to the Institute or to prevent him from asking for an attorney of his own selection.

Wide discretion is given the courts in determining the circumstances under which relief may be granted. Thus the judge "determines whether the financial position of the party is such that he should enjoy this benefit"; the judge must be satisfied that the party "is not in a position, either himself or through a person who officially or otherwise is supporting him, to advance his interests properly in bringing up the case or carrying it through." There appear to be no provisions limiting the application of the law either to specified types of cases or to persons with not more than a specified amount of income or property. A further responsibility cast on the judge is that of deciding the importance of the case to the party, for (by amendment in 1929) a party is not eligible for assistance if it appears to be "of extremely little importance to him that his case should be tried."

Discretion of Courts as to Relief

That the courts exercise their discretion with considerable care and restraint is indicated by the fact that they do not apply the Act in all cases conducted by

the Public Institutes for Legal Assistance on behalf of people having small or no means; as will be described more fully later, in not far from a third of the civil cases thus conducted, and in the bulk of the criminal cases, the litigants are not relieved of the costs and expenses of trial.

Unlike most European laws of this sort,³ the Swedish Act does not require the court to make any preliminary inquiry into the substantive merits of the applicant's claim for relief under the Act. The danger of abuse may be avoided, however, at least in cases where the applicant's lawyer is to receive his compensation from the state, by a provision empowering the judge to reduce the lawyer's fee or to deny him compensation altogether if he has either displayed want of care or has prosecuted the case without sufficient cause. And here again the role of the Public Institutes for Legal Assistance is a further safeguard, since the cases which they conduct on behalf of poor litigants are necessarily cases whose merits have first been inquired into.

Making due allowance for the helpful role of the Institutes, the discretion conferred on the Swedish courts in administering the Free Legal Proceedings Act is extensive and bears testimony to the respect in which the courts are held, and their freedom from politics.⁴ The American Consulate, which at my request inquired among lawyers into the workings of the law, found no grounds of dissatisfaction either with the law or its administration.⁵

In our own country we would scarcely be prepared to grant so much discretion to the courts, but this fact ought not to prevent consideration of the main principles involved or the drafting of statutes embodying these principles and containing reasonable safeguards against abuse. A statute of such a sort, suitable for enactment by the states, was prepared by the Committee on Legal Aid Work of this Association, and filed with its report in 1925.⁶ But no substantial headway has been made in this direction,⁷ despite the shocking inadequacy of our laws in nearly every state of the union. I shall consider these laws under the following headings.

Attorneys' Fees—Civil

(1) *Attorneys' fees in civil litigation.* No state, so far as known, has made provision as in Sweden for payment of attorneys' fees from public sources in the civil proceedings of poor litigants. On the contrary, the job of representation is left to legal aid bureaus, which concededly are far from sufficient both in geographical coverage and in size of staff. The latest report of the Committee on American Bar Association's Legal Aid Work⁸ states that:

"Long experience, reinforced by recent investigation and particularly by the surveys made in the last year or two, establishes the necessity for organized legal aid in most communities of over 50,000 and in some smaller ones."

Nevertheless, though there are legal aid organizations in almost all cities of over 200,000, the Committee points out that they exist

"... in considerably less than one-half of the cities having a population of between 100,000 and 200,000. There are legal aid organizations in only about thirty of the cities having a population of less than 100,000."

The Committee concludes that "there is a need for organized legal aid everywhere except in rural and semi-rural sections." As to the adequacy of existing

organizations, supported, as all but a few are, by charity, the Committee said in its 1938 report:⁹

"Third, and most important, no legal aid organization in the country, however well it is run, is today completely filling the need in its own territory."

As Messrs. Smith and Bradway have pointed out:¹⁰

"The present staffs of legal-aid organizations are already overloaded with cases. To do the more extended work that is necessary means that the office must have larger staffs and this in turn calls for more adequate financial support. The legal-aid organizations are all poor and they always have been."

It must be further remembered that these organizations serve only those who can afford to pay *nothing* for legal services. Those who can afford to pay *something*, but very little, are turned away. The latter must constitute a group fully as large as the former, very likely larger.

It will not do to ignore the problem by suggesting that the readiness of particular lawyers to handle free cases is a sufficient solution. Many lawyers devote a generous portion of their time to free work; but in the nature of things it is impossible to meet the need in this way, save perhaps in rural and semi-rural areas where everybody knows everybody else. To quote again from the 1938 report of the Committee on Legal Aid Work:¹¹

"The records, which we have studied, show that the one great objection [to legal aid work] we must overcome is the following: A motion is made at a meeting that the bar association do something actively in behalf of legal aid work. That motion is then opposed by several honorable, splendid, capable members of the bar who state that they are glad to help poor persons in their own offices. That is true. But they have no conception of the full need and they do not, and can not, fill it. Even if they were to accept and act for every poor person that did apply for help, there would be a hundred times more of men, women, and children, that needed legal advice and assistance who had no idea where to go."

"In the larger cities, our experience convinces us, such persons do not know any competent lawyer who might be available and there is no way for them to find out. Our experience further convinces us that, in the larger communities, lawyers who are willing and who might be available have found out that they are not equipped to handle any substantial number of poor persons' cases and further that the nature of their practice has left them unskilled in many of the typical cases presented by the poor."

We may safely conclude, therefore, that with respect to attorneys' fees in civil litigation: (1) in a number of cities, particularly the largest, there are organizations, insufficiently staffed and supported, to represent the very poor; (2) in a great many cities, particularly those of medium size, there are no such organizations at all; (3) there are no organizations anywhere to represent those who can pay a little something, but who cannot pay enough to interest any lawyer save on a charity basis; (4) the generosity of individual lawyers, in urban communities, if not elsewhere, cannot be a sufficient substitute for a more fundamental grappling with the problem.

Attorneys' Fees—Criminal

(2) *Attorneys' fees in criminal proceedings.*

In all but a few localities persons accused of crime who cannot afford to retain counsel must turn to lawyers assigned to them by the court.

"The importance of developing additional legal aid for the poor in the criminal courts cannot be exaggerated. . . . Legal aid societies supply voluntary defenders

in only a few cities. Undoubtedly, there are many places where, although there is no defender, either public or private, the poor are adequately represented under the system whereby the court appoints a practicing lawyer to represent a particular defendant. But frequently this system has led to the abuse of half-hearted representation or cold-blooded extortion of compensation from the family or friends of the defendant."¹²

There are other difficulties with the assigned counsel system. While (as of 1936) all states had provided for assignments in capital cases, nearly one-fourth had not done so in felony cases, and nearly one-half had not done so in misdemeanor cases.¹³ Only eight states had provided for assignments in the magistrates' or other lower courts, as distinguished from the regular criminal trial courts; and only two had covered proceedings in appellate courts.¹⁴ Nineteen states had made no provision for compensating the assigned counsel; in most of the remaining states the compensation was meagre or nominal (e. g.: North Carolina, \$25 in capital cases, Oklahoma, \$25 maximum; Washington, \$10 per day; Iowa, life or over, \$20 per day, others, \$10 maximum total; Idaho, capital, \$50, felony, \$25, misdemeanor, \$10; and so on).¹⁵ Finally, only eight states had provided reimbursement for the necessary expenses and disbursements of trial (expert testimony, witness fees, travel, etc.)—and two of these limited the reimbursement to capital cases; so that, with these exceptions, "either the attorney must pay the incidental expenses out of his own pocket, which, of course, he cannot afford to do, and therefore does not do, or the defendant must go to trial and do the best he can in spite of an inadequate preparation of his case."¹⁶

It is not likely that the situation has changed much since 1936, when the above study was made; and the stark facts speak for themselves.

Court Costs

(3) Court costs.

Our system of court costs is notoriously a hodge-podge, archaic, unscientific, and burdensome to small litigants; legal aid organizations are unable for the most part to defray these costs; and statutory relief has made but little headway.¹⁷ Nor is there any source for defraying the other non-statutory expenses of trial, save in a few states in criminal proceedings, as already noted.

So much for attorneys' fees, court costs and expenses, all of which in Sweden are paid by the state as necessity requires. I turn now to the second principal feature of the Swedish system.

II. Public Institutes for Legal Assistance

These institutes, corresponding broadly to our legal aid organizations, differ from the latter in important particulars.

1. The institutes are governmental undertakings.¹⁸

The first was founded in Gothenburg in 1872 as a municipal agency. The town retained and paid a lawyer to assist the needy free of charge, or at a reduced fee, according to circumstances, both in and out of court. This arrangement was imitated in several other towns, including Stockholm (1884). The facilities thus provided were found to be inadequate; Stockholm in 1913 established a full-time bureau; and in 1919, at the time of the passage of the Free Legal Proceedings Act, described above, the state enacted a permanent plan for aiding the work. Under this plan the state makes annual grants-in-aid to each Institute. The grants cover all expenses for postage, telephones and



Dean Lloyd K. Garrison

telegrams, and railway fares (all of these being governmental enterprises), plus up to half the salaries of the staff and half the net office expenses. The municipalities pay the balance. In addition, the state makes small grants to help defray the initial expenses of a municipality in organizing an Institute.

The institutes are under the general jurisdiction of the state Ministry of Justice; each is managed by a board of directors, the chairman and vice-chairman being appointed by the governor of the particular province,¹⁹ and the other members by the particular municipality. Each board selects as the manager of its institute a trained lawyer, and he in turn selects, subject to the approval of the board, his legal staff.²⁰

At the time I was in Sweden institutes were thus functioning in Stockholm (population 543,785),²¹ Gothenburg (262,276), Malmö (144,482), Norrköping and Hälsingborg (50,000 to 100,000), and in Eskilstuna and Örebro (under 50,000). Proposals were being considered for the establishment of institutes in several other places. Actually the geographical coverage of those already established is broader than that of the particular municipalities, for several of the institutes have branch offices or local representatives in outlying regions according to the need.

Enough has been said about our own legal aid organizations to point the difference. The first of these organizations were created in the nineteenth century, all as private charitable undertakings, and this form is still overwhelmingly predominant. The first municipal bureau was established in Kansas City in 1910,²² and there are now some ten municipal bureaus, exclusive of the few public defenders in criminal cases. All

the rest of the legal aid organizations, including those in the larger cities, are dependent upon charity, the majority being under community chests, and the remainder being supported by individual gifts, chiefly from public spirited lawyers.²³ Even the municipal bureaus, unaided as in Sweden by state grants-in-aid, are seldom adequately supported, and in times of stringency may, as has happened in Philadelphia,²⁴ be discontinued altogether.

2. The Institutes are not limited to indigents.

In contrast with our own legal aid organizations, the institutes are open not only to those who can pay nothing for legal service but also to those who can pay something. As previously pointed out, our own organizations are forced to turn away people of the latter sort; and many are prohibited, even when requested, from maintaining a reference list of lawyers willing to handle small matters at reduced fees or from suggesting in any way what the applicants should do (nearly all of them being people who know no lawyers and who are totally at sea).²⁵ I have been unable to ascertain precisely where the line is drawn between applicants whom the Swedish institutes will serve and those they will not serve. The Royal Social Board states that:

"The institutes are open to anyone who is considered to be of small means. The production of a certificate as to the financial standing of the applicant is not necessary as a rule, but the applicant is liable to be called upon to provide evidence on this point if required."²⁶

The American Consulate, after making inquiries, informed me that (in the case of Stockholm):

"It is not possible to indicate the dividing line financially between persons who may use the services of the Institute for free legal assistance and those who may not. It is said that probably more than half of the total

population of Stockholm, including practically the entire labor class, would come within the category of those who might use the services of the Institute."

I think it is safe to assume from the foregoing that the institutes are open not only to indigents but to persons of small means generally, at least in situations where the amount they could afford to pay would make it difficult for them to obtain competent legal service on a professional basis. This conclusion is well fortified by the list of the occupations of the clients of the Stockholm institute in 1937, hereinafter set forth in detail. That list, as will be seen, includes a considerable proportion of persons whom we would classify as white collar workers.

By including persons of small means as well as indigents the Swedish institutes are rendering service of a scope unknown in our country.

III. A Comparison of the Stockholm Public Institute for Legal Assistance and the Milwaukee Legal Aid Bureau

Through the American Consulate I obtained a copy of the Report of the Stockholm Institute for 1937, and I am indebted to Professor Einar Haugen of the University of Wisconsin for a careful translation of the document. This report throws a good deal of light on what is actually being done in Sweden. I thought it might be interesting to compare this report with that of the Milwaukee Legal Aid Bureau for the period October 1, 1936 to September 30, 1937, since the two cities are fairly comparable in size, Stockholm being 543,785, as indicated above, and Milwaukee (as of 1930) 578,249.²⁷ Stockholm with its suburbs has a population of 696,484²⁸ and Milwaukee County (nearly all of which is tributary to the city) 725,263. The advantage of size is a little in favor of Milwaukee,



City of Stockholm

Courtesy Swedish Travel Information Bureau

and, in considering the relative extent of the services rendered by the two organizations, it should also be kept in mind that Milwaukee is largely an industrial city, and therefore presumably in greater need of legal aid services than Stockholm, which, located on thirteen closely knit islands, is the intellectual and administrative center of Sweden and has relatively little manufacturing.²⁹ In picking out the Milwaukee Bureau I have been motivated only by the relative comparability of the size of the two cities and by the immediate availability of the Milwaukee reports. As the statistics of the other bureaus in this country show, the Milwaukee Bureau represents a fair average in size and effectiveness in relation to the population served;³⁰ and it represents the predominant type of legal aid organization, being a private incorporated society supported by the community chest.

Finally, the Milwaukee and Stockholm organizations were founded at about the same time, Milwaukee in 1916³¹ and Stockholm (as a full-time city bureau) in 1913.³²

A comparison of the Stockholm report with the report for the year preceding, and of the Milwaukee report with the report for the year immediately following, reveals no substantial fluctuations in the volume of the work handled by each organization, so that I think the two reports here presented may be taken as a fair indication of the work of the respective bureaus.³³

1. Staff.

The Stockholm staff consisted for the year in question of seven full time lawyers,³⁴ fourteen office workers, and three clerks. The Milwaukee office consisted of a superintendent (a woman who was a member of the bar), a part-time attorney (to whom the trial of civil cases was assigned), and a clerk.

The lawyers' salaries in the Stockholm office ranged from approximately \$3,840.00 a year for the top man to approximately \$1,440.00 for the juniors.³⁵ The Milwaukee office paid its superintendent \$1,980.00 and its part-time attorney \$1,800.00.

2. Number of cases handled.

The Stockholm Institute handled 13,548 new cases,³⁶ the Milwaukee Bureau 2,430. During the same year the New York Legal Aid Society, in a city with a population some twenty times that of Stockholm, handled less than three times as many cases.

3. Finances.³⁷

Expenditures	Stockholm	Milwaukee
Salaries and wages.....	\$36,779	\$5,074.50
(For Stockholm the figure includes \$952 for vacations, and \$716 for "cleaning, wash and the like.")		
Rent	4,320	none*
Heat and light.....	785	none*
Purchase and maintenance of equipment	119	25.00
Postage	1,061	51.73
Printing, supplies, etc.	1,237	72.89
"Expenses for special legal aid".....	181	.....
Telephones	1,062	83.71
"Communications and summonses".....	612	.....
"Pensions and Support".....	1,065	.....
(From other indications in the report, it would seem that this item consists of social security assessments)		
Miscellaneous expenses	148	36.00
	<u>\$47,369</u>	<u>\$5,074.50</u>

[*The Milwaukee office is located free of charge in one of the municipal buildings adjoining the County Court House.]

Income. Except for private contributions totalling \$55.00 (derived from members of the Legal Aid Society, paying for the most part annual dues of one dollar each)³⁸ and except for the municipal contribution of office space, the Milwaukee Bureau received its entire income from the Community Chest.

The Swedish Institute received a grant of \$7,130 from the state.³⁹ It received further state assistance in the shape of a total of \$7,616, made up of fees for its legal services in conducting cases under the Free Legal Proceedings Act, described above. (In about 68 per cent of the civil cases conducted by the Institute its clients were adjudged by the court to be entitled to the benefits of the Free Legal Proceedings Act; but similar action was taken in only about 20 per cent of the criminal proceedings.)⁴⁰ The Institute received further revenue aggregating \$3,679, composed partly of costs charged against losing parties and partly of commissions received from clients in cases where something substantial was realized. I was unable to obtain exact information regarding these commissions or the circumstances in which they are charged, but in view of the extent of the litigation conducted by the Institute, as will appear presently, and the smallness of the figure just noted, the matter is not one of much moment.⁴¹ The total revenue of the Institute from these three sources aggregated \$18,425, leaving a net balance of \$28,944 which was defrayed by the city.

4. Types of clientele.

The following tabulation of the clientele of the Stockholm Institute in 1937 is taken from its report, but the grouping into "white collar workers," "other workers" and "unclassifiable" is my own. My purpose was to ascertain as nearly as possible the proportion of clients whose probable range of income would in this country disqualify them from legal aid bureau assistance. Presumably all those, or nearly all those, in the "white collar" group would be so disqualified; very likely many of those in the "other workers" group, such as relatively well paid chauffeurs, craftsmen and others, would be similarly disqualified. The groupings are necessarily only roughly approximate, but I think it is clear from the face of the report that a very considerable proportion of the clientele would in this country be ineligible for legal aid. The list is as follows:

White collar workers	Men	Women	Total
Salesmen, agents and the like.....	604	196	800
Business assistants	136	480	616
Office workers	261	294	555
Business workers	322	43	365
Others in industry and commerce..	288	52	340
Engineers, superintendents and the like	199	1	200
Government workers of lower ranks	158	17	175
Ships' mates, machinists, barge skippers	66	...	66
Private teachers	19	46	65
Home owners, farmers and tenants	50	3	53
Military men	29	...	29
	<u>2,132</u>	<u>1,132</u>	<u>3,264</u>
<i>Other workers</i>			
Manual laborers (non-agricultural)	1,410	58	1,468
Industrial workers	816	185	1,001
Servant girls .....	...	765	765
Chauffeurs and the like.....	457	...	457
Hotel and restaurant workers (other than waiters, waitresses).....	48	395	443
Chambermaids .....	...	431	431
Seamstresses .....	...	387	387

<i>Other Workers</i>	<i>Men</i>	<i>Women</i>	<i>Total</i>
Waiters, Waitresses	54	266	320
Craftsmen	301	15	316
Fishermen, cotters, agricultural laborers	137	10	147
Sailors	97	...	97
	3,320	2,512	5,832

Unclassifiable

"Other occupations"	487	361	848
"Unoccupied"	80	3,524†	3,604
	567	3,885	4,452

†2,374 of the women in this group were married;
909 were widowed or divorced;
241 of the women in this group were single.

Recapitulation:

	<i>Men</i>	<i>Women</i>	<i>Total</i>
White collar workers	2,132	1,132	3,264
Other workers	3,320	2,512	5,832
Unclassifiable	567	3,885	4,452
	6,019	7,529	13,548

It is interesting to note the list of those classed as "unoccupied." Only 80 of the more than 6,000 male applicants were so listed. That is to say, there were only 80 unemployed men in the whole city of Stockholm in the year 1937 who sought legal assistance. Somewhat less than half of all the women clients were

classed as "unoccupied," but two-thirds of them were married, and there is nothing to indicate one way or the other whether they represented an unemployment problem. I am inclined to think that the figure of only 80 unemployed men is an indication of what was apparent while I was in Stockholm: namely, that the city has very little unemployment. It cannot be argued that unemployed persons have no legal problems and that that is why they did not seek legal aid in greater numbers, for I am informed by the Milwaukee Bureau that most of its clients are persons on relief.

The Milwaukee Bureau does not publish the occupations of its clients, but since for the most part they have no occupations, and since none of them fall within the white collar category, being persons with no means at all, the omission is natural. Some indication, however, of the types of human beings who call upon the Bureau may be derived from the published statement of the sources through which they learn of the Bureau's availability. Of the 2,430 clients in the year studied, the source of reference in the cases of 1,394 could be ascertained. Of the balance, 806 were unable to remember or to tell how it was that they heard of the Bureau, and 230 came because they had come before, with nothing indicated as to the source of their original visits.

(To be continued)

NOTE—Footnotes will be published in the next issue, with the continuation of the article.



City of Milwaukee

Courtesy Milwaukee Association of Commerce

MISSOURI INSTITUTE SPONSORS PLAN FOR IMPROVING SELECTION OF JUDGES

By Ronald J. Foulis

*Former Chairman, Committee on Judicial Selection,
St. Louis Bar Association*

A campaign for an amendment to the Missouri Constitution, establishing a non-partisan method of judicial selection, was launched January 11, at a meeting in Jefferson City, Mo., of the Missouri Institute for the Administration of Justice, a state-wide organization composed of both laymen and lawyers.

This action is in harmony with recommendations of the Missouri Bar Association, which considered and endorsed the plan at its annual meeting in St. Joseph on Sept. 29, 1939. The proposed amendment will be submitted to the voters of the State, by the initiative, at the general election, Nov. 5, 1940.

The proposal has the main features now generally familiar to lawyers of nomination by a commission to fill vacancies, appointment by the governor and a provision for the incumbent to run against his record a year or more after his appointment and at each subsequent expiration of his term.

Details of the Amendment

The plan would immediately apply to the Supreme Court, to the three Courts of Appeals of the State and to the Circuit and Probate Courts of the City of St. Louis and Jackson County (including Kansas City). This would include all of the Appellate Courts of the State, and the Circuit and Probate Courts of the larger metropolitan areas. The voters of any other judicial circuit within the state would have the right to adopt the same plan by means of a referendum, thus leaving the adoption of the plan in such circuits a matter of local option.

Under the plan, when any vacancy would occur in the office of a judge, it would be filled by an appointment by the Governor, whose choice would be restricted to a list of three names submitted by a non-partisan commission. After appointment the judge appointed would hold his office for one full year, and until December 31 following the next general election thereafter. The appointed judge would have the right to have his name submitted to the voters at such general election on a separate judicial ballot without party designation, and reading only, "Shall Judge of the Court be retained in office? Yes (). No ()." If a majority of those voting on the question would vote against the judge, his term of office would expire on the following December 31, and a vacancy would exist, to be filled by appointment in the same manner. If he received the affirmation of a majority of the voters, he would remain in office for a full term as now provided by statute, and at the expiration of each such term would be eligible for retention in office in the same manner.

All incumbents of the office of judge of the courts affected at the time the plan took effect would be retained in office for the balance of their term, and at that time would have the privilege of submitting their names to the voters in the same manner as a judge who was appointed. Thus the plan would not change the present personnel of the courts, all present judges remaining in office, subject only to their ability to obtain

the endorsement of the voters at the end of their present terms.

As the plan is designed to secure an intelligent and impartial selection of the personnel of the bench and to eliminate the present haphazard results of the elective system, the essential feature of it is the nominating commissions which select the names from which the Governor must make his appointment. The amendment creates a commission to nominate lawyers to fill any vacancy on the Supreme Court or any of the Courts of Appeals, and also separate commissions to nominate lawyers for the office of Circuit and Probate Judge for each judicial circuit. The commission to nominate for the Supreme and Appellate Courts would consist of seven members who would be:

(1) The Chief Justice of the Supreme Court of Missouri, who would act as Chairman;

(2) Three lawyers, one from each of the three Court of Appeals Districts of the state, who would be elected by the members of the Bar under rules and regulations to be promulgated by the Supreme Court;

(3) Three citizens who are not members of the Bar, one to be appointed by the Governor from each of the respective Court of Appeals Districts.

The Circuit commissions would be constituted of:

1. The presiding Judge of the Court of Appeals of the district in which the circuit is situated;

2. Two members of the Bar who would be elected by members of the Bar residing within the circuit, under rules and regulations promulgated by the Supreme Court of Missouri;

3. Two citizens who are not members of the Bar to be appointed by the Governor.

The terms of office of the members of the commissions would be fixed by the Supreme Court, and the commissions would be administered under rules to be promulgated by the Supreme Court.

The members of all commissions other than the Chairman are forbidden to hold any public office, or to hold any official position in a political party.

The amendment also specifically prohibits any judge of a court of record appointed or retained in office under the provisions of the plan, from making any contribution to a political party or taking part in any political campaign.

The report of the Committee which submitted the plan to the Missouri Bar Association, points out that it is in no way novel or revolutionary, but is founded upon a principle of judicial selection tried and found successful in the oldest states of the country and by the Federal Government, that it is a plan which retains the democratic idea of ultimate control over judges by the people, *along with an intelligent method of selecting qualified candidates for judicial office, regardless of political considerations.*

Missouri History of Proposed Plan

The plan in its essentials is in substance the same as that approved by the House of Delegates of the American Bar Association in 1937. It is the fruition of a considerable amount of thought and study on the subject. In view of the attention which the matter has received in many parts of the country, a review of the history of the proposal in Missouri is worth while.

The first indication of the movement in Missouri was the report of the Judicial Council in 1936, which said:

"that neither the Bar nor the public is able to

draft a man of high attainments who might accept the office (of Judge) but is unwilling to enter into a scramble to attain it, is enough to condemn the system."

In February, 1937, the Bar Association of St. Louis appointed a committee to study the problem of judicial selection and tenure. This committee submitted a preliminary report in September of 1937, recommending a plan which was printed and distributed for further suggestions and criticism. In December, 1937, this plan was approved with only minor changes by the Bar Association of St. Louis. Several months later the plan suggested by the Bar Association of St. Louis was approved in substance by the Lawyers' Association of Kansas City, which criticized it, however, on the ground that it was too detailed and legislative in character, and therefore inappropriate as a constitutional amendment. It was also criticized on the ground that it took away from the Legislature administrative functions properly belonging to that body. Conferences were subsequently held between representatives of the Lawyers' Association of Kansas City and the Bar Association of St. Louis, and a Special Committee of the Missouri Bar Association appointed to study the problems. As a direct result of these conferences, a proposed constitutional amendment was drafted and submitted to the annual meeting of the Missouri Bar Association at St. Louis on October 1, 1938. The report of the Committee which proposed this last mentioned form of constitutional amendment was unanimously approved by the Missouri Bar Association at that meeting, together with a recommendation that the Committee be directed to secure its submission to the Legislature and the people of the State.

As a result of this action, the Committee on Amendments, Judiciary and Procedure of the Missouri Bar Association caused the constitutional amendment to be submitted to the Missouri Legislature, and a Joint and Concurrent Resolution for its submission to the voters was introduced in the House of Representatives of the State Legislature. The resolution was referred to the Committee of the House on Constitutional Amendments, and hearings were held at which representatives of the Committee and other interested citizens of the State appeared in behalf of the resolution. No one appeared in opposition. After this hearing the Chairman of the House Committee announced that the matter would be laid over to give anyone who desired to appear in opposition to the resolution an opportunity to be heard. Although the matter was subsequently set for such hearing, no one appeared in opposition to the resolution. However, the House Committee proceeded to report the bill unfavorably without any explanation for its action. The State Bar Committee thereupon recommended to the State Association at the annual meeting last September that the Association immediately commence a campaign of public education in behalf of the plan, with a view to submitting the plan directly to the voters of Missouri through the initiative, at the general election in the year 1940.

The Missouri Institute for the Administration of Justice, which is sponsoring the passage of this proposed amendment to the Missouri Constitution, was organized two years ago consisting of representative citizens from all parts of the State. The Institute has successfully sponsored a movement to secure improvement in the rules of practice and procedure of the State Courts. The securing of a better method of selecting

members of the Judiciary is the second major objective of the Institute. Its present program calls for a statewide organization built around a nucleus of skilled and experienced personnel. The prospects for a successful campaign, in view of the Institute's carefully laid plans, are exceedingly bright.

California's victorious and well-organized campaign in 1934 gave an enormous impetus to plans for an appointive judiciary subject to subsequent periodic checks by the electorate. Defeat of the Michigan and Ohio amendments last year may have tended to discourage some advocates but students of the situation in those states believe that the results were caused by failure to bring about a widespread understanding of the situation on the part of the public. This was probably due to lack of adequate funds and insufficient campaign organization. Missouri's determination to press its campaign in 1940 is a sign that the Bar is determined to bring about better methods of judicial selection and it is believed that it will benefit from the experience gained in Michigan and Ohio.

NOTICE OF APPOINTMENT OF COMMITTEE TO MAKE 1940 AWARD OF MERIT TO STATE AND LOCAL BAR ASSO- CIATIONS

IN accordance with the authority given by the House of Delegates at its Cleveland meeting, a Committee has been appointed to make the 1940 Award of Merit to the State Bar Association performing the most outstanding and constructive work during the current year, and a like award to the local Bar Association performing the most outstanding and constructive work in its field during the same period.

The Committee will make this award at the time of the annual meeting of the American Bar Association in September. State and Local Bar Associations which wish to have their year's work considered by the Committee in making this award, should write to L. Stanley Ford, 210 Main Street, Hackensack, New Jersey, Secretary of the Section of Bar Organization Activities, for application blanks. Such applications must be filed on or before August 1, 1940.

NEW SERVICE TO MEMBERS

As part of its program for increased service the American Bar Association has made arrangements to furnish to its members copies of Opinions of the Supreme Court, at a cost of \$1.00 for each opinion. Copies of opinions will be sent by air mail within twenty-four hours after the opinion is handed down, which means that they should be received anywhere in the United States on the second day. Requests for opinions may be made prior to the time the decision is announced. Where available, please give Supreme Court's docket number, name of case, and, especially if docket number is not given, a word or two as to general subject matter and status of case. All requests should be addressed to the American Bar Association, 1152 National Press Building, Washington, D. C., and should be accompanied by a check payable to the order of the Association for \$1.00 for each opinion requested. If it is desired that the opinion be sent special delivery, 10c should be added to the remittance.

LEGAL SERVICE AND CHILDREN'S AID SOCIETIES*

Buffalo Finds Legal Aid Bureau and Children's Aid Society Mutually Helpful—Difficult Legal Questions that Come Up for Decision—Some Parents Reject Medical Care for Their Children: Guardian Appointed—Social Aspects of Divorce—Alien Mother Deported: Children American Citizens—Public Authorities Occasionally Lax in Prosecuting Offenses Against Children—Criminal and Civil Cases Handled by Cooperation Between the Two Societies

BY ELMER C. MILLER

Counsel for the Legal Aid Bureau of Buffalo

I DESIRE to submit to you some of the results of a pleasant relationship which has existed between the Children's Aid Society and the Legal Aid Bureau of Buffalo. Throughout approximately the past quarter of a century great satisfaction has been ours as we reflect upon the obvious accomplishments resulting from this active cooperation. Too frequently in the past we have heard of substantial differences existing between the social service and legal groups, and if that is or has been a fact it is hoped that our experience will conclusively prove the folly and absurdity of such an attitude.

We do, of course, have occasional disagreements, but happily have always been able to discuss them in a completely understanding manner, having continually in mind that it is often desirable to submerge some differences for the purpose of performing a more adequate and progressive service. Invariably these differences have produced thoughts or suggestions which ultimately have been crystallized in desirable changes in our practices, in legislation or in court procedure.

This intimate contact has not been confined nor restricted to questions involving specific cases but has been predicated on a very broad and liberal scale.

Removal of Natural Parent as Guardian Sometimes Necessary

In the very early years of this effort there developed the need for a definite and legal form of surrender, although at that time there was no statutory regulation thereof. After an examination of a number of cases involving this instrument, a form was prepared for immediate utilization. This draft has been used down through the years and subsequently, when the legislature determined to provide therefor by statute, it was found that this very early form complied therewith and at this time it is being used satisfactorily in substantially its original form by the majority of agencies in Erie County.

Our association through the years has suggested advanced and improved techniques which on many occasions are available for useful purposes. A simple illustration involves the case of a widower father of three children of the age of five, eight and ten. Complaint had been made that he would on each pay night, after having partaken too generously of a liquid diet, strike and beat the children. Before an adequate investigation could be made by the Children's Aid Society, friends of the children had procured a warrant

for the arrest of the parent because of the commission of these various assaults.

The family home was located in an outlying rural community which necessitated that these criminal proceedings be brought in the local court. After trial of the case the justice of the peace discharged the defendant upon the ground that there was a failure to prove beyond a reasonable doubt the wrongful action of the defendant father. It, of course, was quite irrelevant that a relative of the justice had for years provided the father with the trouble-making grog.

There was no right to appeal from this decision and one would feel ordinarily that nothing more could be accomplished by way of legal procedure to correct this unfortunate condition. We, however, immediately instituted a proceeding in the Surrogate's Court of Erie County for the removal of the guardianship of this father because of his cruel and inhuman treatment of his children. This proceeding is a purely civil one and does not require the production of the preponderance of proof that is necessary in a criminal action. After hearing the evidence, which was practically the same as that introduced in the criminal trial, the Surrogate was convinced of the wrongful conduct of the father toward these children and promptly removed his guardianship.

Parents Refusing to Follow Necessary Surgical Treatment

Again, in the very early days we never dared to remove a guardianship for the purpose of having performed immediate and necessary tonsilectomies and appendectomies. In a study of cases requiring this type of surgical treatment, it was soon ascertained to be highly desirable in certain circumstances. Particularly so where a parent had abandoned a child to the care and custody of the Children's Aid Society or where a guardian has disappeared, leaving his whereabouts unknown. We then, in proper cases, determined to have the Children's Aid Society appointed as guardian for this type of unfortunate infant for the purpose of giving legal consent or permission for the performance of this work. Thereafter we did so proceed, although I might add most cautiously and circumspectly, to obtain relief for the child's physical ailments.

We fortunately have as yet met with no serious legal challenge to our practices in these cases and, happily, all of the operations have been successful. One day a most unusual matter involving this theory was presented for our consideration.

A boy of ten years, the son of foreign-born parents,

*An address delivered at New York State Conference on Social Work, Oct. 19, 1939.

who unfortunately had not assimilated our customs and ideas, had been playing with a neighbor's child and while so engaged a piece of wood entered and injured one eye. A few days later neighbors noticed the injury and found upon inquiry that the parents had neglected to provide necessary medical services either because of ignorance or lack of funds, or both. Information of this situation was furnished to the Children's Aid Society and in the course of its investigation the worker, through neighbors, friends, school teachers and the family clergyman, endeavored to persuade the parents to believe that immediate medical care was necessary for their child. Being of an unduly suspicious nature these parents adamantly refused to accede to these pleas and requests.

It was then decided to bring proceedings in Surrogate's Court for the termination of the guardianship of these parents so that proper medical care might be provided for this boy. Upon the return date in the Surrogate's Court the parents through interpreters rather subtly informed all and sundry that in the event surgical care were furnished against their wishes and serious or fatal effects should accompany same, the Children's Aid Society and the Legal Aid Bureau would be immediately proceeded against for the collection of any damages caused through this course of action.

Outstanding local experts testified that unless the injured eye, the sight of which had entirely disappeared, was immediately removed, there was the grave prob-

ability of the setting in of a sympathetic ophthalmia which probably would result in the loss of the sight of the uninjured eye. Quite properly this guardianship was removed, the operation performed and then an artificial eye provided for this little chap.

Here there was not only accomplished a distinct personal benefit but a very substantial community saving. This little fellow of ten years had a life expectancy of forty-eight years. Had he lost the sight of his other eye, he undoubtedly would have been a charge upon the community for this period of time. It is said that the average costs for the education and maintenance of a sightless person averages approximately \$400.00 per year, and thus it can be fairly represented that a community saving of \$19,200.00 has been accomplished.

Both the Children's Aid Society and the Legal Aid Bureau are members of the Joint Charities and Community Fund and it is particularly gratifying to report savings of this type.

Social Aspects of Divorce

It is really astonishing how a lawyer can be influenced by the social aspects of a case. An apt illustration involves a mother of ten children, eight of whom were born in wedlock and two without its benefits. Only after desertion by her husband did she become interested in the man who became the father of the latter two children. This individual assumed the husband's role and for a long period of time contributed



Former Senate Chamber, Used by the Supreme Court from 1860 to 1934. L. C. Handy Studios

practically all of his finances to the support of this household.

The mother contacted the Children's Aid Society worker to ascertain whether or not she could obtain a divorce because of her husband's desertion and then marry the father of the out-of-wedlock children. She was, of course, informed that she could not legally so proceed in New York State.

Investigation developed that the husband, because of his physical and mental condition, particularly the latter, had not for years contributed anything other than a mere pittance for the support of his eight children and wife and had no present affection or interest in them. The worker informed us that it was desirable to sever these matrimonial ties, as the paramour had agreed to marry the woman if and when she were free, and thereby make her home secure and legitimize the two children. A meeting of the worker, the husband and the wife at the Legal Aid Bureau culminated in a plan whereby the Bureau would proceed on behalf of the husband to obtain a divorce and request of the court that the custody of the children of the marriage be granted to the mother, with reasonable provisions for the father seeing and visiting them. Without previous immersion in the social service bath this procedure might well have shocked a lawyer's legal senses and responsibility because a divorce action is considered an action in equity, in which a party guilty of misconduct seldom receives relief.

In this branch of the law we recognize certain time and judicially honored maxims for our guidance. The examination of our law books first confronted us with the maxim "Equity aids the vigilant, not those who slumber on their rights." It was our thought that surely this mother is both vigilant and diligent about her rights, and if anyone were guilty of slumbering, it properly was her husband, who had at least been slumbering away from his family. There was also found that oft referred to maxim "He who comes into equity must come with clean hands." Certainly this mother had been somewhat careless about her morals, but she was earnestly maintaining this home for these children and endeavoring to obtain a definite legal status for the unfortunate two. From a strictly legal point of view, she should receive but little consideration, but the social aspects of this case were so strong and so compelling that we determined that this woman's hands were but slightly soiled and proceeded to obtain the relief desired.

The divorce was obtained, custody of the eight children given to the mother and after the decree became final she, together with the father of the two children, journeyed to an adjoining state, were quickly married and then returned to their household. We believe they are now living happily together.

Deportation of Alien Mother: Children Citizens of United States

The cooperative efforts of the Children's Aid Society and the Bureau can be of real value to federal and other authorities. An alien mother of Scotch descent and uncommonly flighty nature while in her homeland took on a close relationship with a Hindu aviation student. Result, one child out of wedlock. Upon the death of the father, the mother wended her way to Canada without the child. After a short but very exciting stay, she journeyed to Buffalo on a visa permitting the performance of but one dancing exhibition. This became a somewhat protracted performance, as

she remained here as a taxi dancer and married a local resident with whom she lived for a time. Ever on the alert for opportunities she soon sought new pastures and entered into an intimate relationship with another man which, in due course, produced another child. Her husband became somewhat chagrined and obtained a divorce. She and the latest male conquest journeyed to another state, married and legitimized this child, which was soon followed by another. Because of the second husband's frequent law violations these parties led a precarious existence and soon became relief recipients.

The second wife of husband number one felt that he continued an amorous interest in his first wife and promptly told all to the immigration authorities. When the Children's Aid Society came upon the scene it was discovered that a number of well-intentioned persons, through a senator and representative, had sought to forestall deportation by contacting the Secretary of Labor. One of the reasons therefore was the fact that the mother soon expected one more child. While these proceedings were pending, the second husband abandoned his wife and family and settled in the State of Georgia. Shortly thereafter deportation proceedings were about to be completed, but the immigration authorities were reluctant to proceed because the children were citizens of the United States and upon the further ground that they could not obtain a consent of the father to the deportation of the children.

It was found upon investigation that the father was unwilling to assume responsibility for the support of the children. We thereupon, through correspondence, informed him that unless he accepted this responsibility and performed his legal obligations, we would proceed to remove his guardianship. Failing to so agree, proceedings were then instituted in the Surrogate's Court for the removal of his guardianship. A decree was entered removing his guardianship and vesting it solely in the mother. The immigration authorities then obtained the mother's consent to deport the children also. The mother and children were then removed to her native land and the burden of care and support of these three removed from our agencies. We trust she now has completed her peregrinations.

There has been presented to the Children's Aid Society the sad case of an eighteen-year-old mother of two children. She had been married at the age of fourteen years and had lived with her husband until soon after the birth of a second child, when he abandoned and deserted the family.

The wife was considerably relieved at this departure, as his entire course of conduct toward her had become quite brutal and inhuman. Frequently he would return to annoy and aggravate her. This activity caused the wife to suffer a nervous breakdown which was followed by a period of insanity. Upon recovery, her physicians and the Children's Aid Society felt that a change in the marital status would enable her to make a better social adjustment and in some degree prevent recurrence of her mental illness as well as determine the paternity of one of the children which had been questioned by the father.

An action for annulment of this marriage was brought on her behalf upon the theory that she had been under the age of legal consent at the time the marriage was solemnized. The court granted an annulment decree and upon the recommendation of the Children's Aid Society gave custody of the children to the maternal grandmother subject to the supervision of the Chil-

dren's Aid Society with the usual direction for the husband to support.

Crimes Against Children—Prosecution of Offenders

Certain representative citizens in an outlying community had brought to their attention an increasing number of sex assault cases and ascertained that in very few were the defendants punished. They soon learned from the court records that the complainants in these cases appeared without counsel or representation by the prosecuting authorities. They thereupon presented this information to one of the prosecuting authorities, who stated that the staff was so busy that it was quite impossible for any member to appear and prosecute these actions. These good people then complained to the Children's Aid Society which made a complete examination. The result of its investigation was that many guilty defendants had been released and some few had not been apprehended. An informal meeting of these citizens, members of the Children's Aid Society and bureau staffs felt it discreet to await the occurrence of a future case and then determine a definite course.

Such a case arose and the Legal Aid Bureau appeared on behalf of the People and prosecuted, obtained a conviction and the jail sentence of the defendant. Soon another case occurred involving three defendants. These were prosecuted as in the former case and again there resulted the conviction and imprisonment of each of the defendants. Approximately six weeks thereafter two or three additional cases were conducted in the same fashion with the same results. We have heard no further complaints from that section of our county, although these incidents occurred nine or ten years ago.

Time forbids the submission in detail of the varied services rendered by the Legal Aid Bureau.

In the domestic relations group, we have performed services related to divorces, separations, annulments and dissolutions of marriage, the so-called Enoch Arden decrees; and consideration has also been given to common law marriages, miscegenation and questions arising out of marriage licenses and applications. There have been the matters of appointment and removal of guardians, transferring guardianship and the examination and preparation of guardians' accounts and inventories. Adoption proceedings have been instituted and some have been abrogated. We have advised concerning common law marriages and legality and proof of their consummation, the legal effect of a marriage solemnized in a foreign country and the legality of a second marriage without modification of the first.

Habeas Corpus proceedings have, in some instances, been brought in behalf of the Children's Aid Society and in other cases have been defended for them. And then, too, there has been that rather simple question of the holding of a child for the satisfaction of a board bill.

Great Variety of Civil Cases Handled

In the contract group, board bills have been collected, a parent's liabilities for debts contracted by a minor have been passed upon and the matter of caddies' employment. Decedents' estates, infants' estates and incompetents' estates have all furnished legal questions for decision. In the criminal branch of the law, sex assault cases, Mann act violations, plain assault and battery matters and general advice relating to the sufficiency of proof and other questions of evidence have

furnished the material for our common thoughts. In the tort field, we find the Workmen's Compensation proceedings, property damage and personal injury claims and threats to inflict bodily harm on the Children's Aid Society employees. Affidavits and petitions of many different sorts have been drafted.

Distinct opportunity for service continually presents itself in the field of legislation where they may be considered entirely new statutes and acts amending existing laws.

Under the miscellany heading we might place the problem of whether or not a Children's Aid Society record is confidential and to what extent, and the rule prohibiting disclosure of confidential communications by an attorney. The proper use of the society's corporate name, advising as to proof of citizenship and the copyrighting of radio publicity episodes. Almost one hundred different legal questions have been submitted to the Legal Aid Bureau.

This functioning of the Children's Aid Society and the Legal Aid Bureau is not at all unilateral. Frequently adoption and domestic relations cases of various types originate in the Legal Aid Bureau and in those instances we look forward to and receive the whole-hearted and competent assistance of the Children's Aid Society in the investigation and reporting of those facts and circumstances which affect the children.

It is quite evident that lawyers can and do perform valuable services in the social work and related fields.

WHERE SUPREME COURT HAS SAT

"(1) The Court originally sat from 1801-08 in the room which is now occupied by the marshal of the Court, to the south of the present court room. . . *

"(2) In 1808-09 the Court sat in the rooms now occupied by the clerk of the Court, while the Senate Chamber was being reconstructed.

"(3) In 1810-14 the Court sat in the room now occupied by the law library on the basement floor underneath the then Senate Chamber, that basement room having been formed when the then Senate room was floored over at the level of the first floor of the Capitol.

"(4) In 1815, after the destruction of the Capitol by the British, the Court sat at 204-206 Pennsylvania Avenue SE, in a house occupied by its clerk, Elias B. Caldwell.

"(5) In 1817-18 the Court sat in a small temporary room in the north wing of the restored Capitol.

"In 1819 the Court moved back into the room on the basement floor, in which is the present law library, and it remained in that room from 1819 to 1859-60, when it moved into its present quarters (the old Senate Chamber.)

"It was in this basement room that the great cases of the Court were decided—the *Dartmouth College Case*, *McCulloch v. Maryland*, *Cohens v. Virginia*, *Gibbons v. Ogden*, the *Cherokee Indian cases*, the *Dred Scott case*, and many other famous historical cases; and in that basement room there appeared and argued all the great lawyers of the American bar prior to 1860."

(From a letter of Charles Warren to Senator Robinson, March 13, 1934.)

*(Mr. Warren now [Feb. 15, 1940] has some doubt about this.)

THE ACHIEVEMENTS OF THE AMERICAN BAR ASSOCIATION: A SIXTY YEAR RECORD*

BY MAX RADIN

CHAPTER IX (Continued)

THE AMERICAN BAR ASSOCIATION AND THE PUBLIC

THE most dramatic and striking exemplifications of what has been said are presented by extremely recent history. The election of President Franklin D. Roosevelt in 1932 came after a serious business depression—perhaps the most serious in our economic history. At the very beginning of his administration, President Roosevelt announced his program of a "New Deal," which became the symbol of a series of changes to be effected by legislation which were more markedly in opposition to the prevailing conservative doctrine than any political program previously announced. That economic and industrial leaders would oppose it, was inevitable, and that the economically more successful lawyers would share in this opposition was also a matter of course.

Child Labor

A minor element in the program of President Roosevelt was a renewed attempt to secure the complete abolition of child labor in the United States. Child labor has been abolished by local statutes in most of the states. The opposition to it on moral, economic, and social grounds need hardly be set forth in detail. The kind of child labor which was so crying and dreadful an abuse in England in the early decades of the nineteenth century may be said to have disappeared almost everywhere in the United States. Indeed, the International Labor Office described the child labor legislation of most of the American states as much in advance of that of most other countries.

But it was none the less the fact that between 1870 and 1910 the number of children between ten and fifteen gainfully employed rose from thirteen to eighteen per cent. It fell to eight per cent between 1910 and 1920 because of the enactment of compulsory school and child labor legislation. A strong movement arose to eliminate it altogether.

This movement resulted in the passage of the first federal Child Labor Act (Sept. 1, 1916, 39 stat. at Large 675), which forbade the use in interstate commerce of the products of establishments in which children under sixteen worked more than eight hours a day or worked before six in the morning or after seven at night. This statute was declared unconstitutional in *Hammer v. Dagenhart*, 247 U. S. 251 (1918), on the ground that it attempted to enforce a police regulation by means of the commerce clause.

In 1924 a constitutional amendment was proposed permitting Congress to limit, regulate, and prohibit the labor of persons under eighteen years of age. At the end of seven years only four states had ratified it, but shortly after, especially under the pressure of the economic changes initiated by the new administration, rati-

fications became more numerous. A number of questions involving the legality of the ratifications had also arisen.

And, at the same time, a real opposition had developed on the part of a number of persons, both laymen and lawyers, to the amendment.

At the meeting of the American Bar Association at Grand Rapids, Michigan, on August 30, 1933, a resolution was recommended to the Association disapproving of the proposed constitutional amendment as an "unwarranted invasion by the Federal Government of a field in which the rights of the individual states and of the family are and should remain paramount." Attention was called to the approval by the Association of the Uniform Child Labor Law in 1930.

The resolution was adopted. During the following year discussion raged high over this resolution. An address by W. D. Guthrie over the radio, reprinted in the *AMERICAN BAR ASSOCIATION JOURNAL* for July, 1934, supported the resolution and condemned the amendment. He was answered by Charles C. Burlingham of New York in the November issue. None the less, a special committee to secure the purpose of the resolution was appointed and this committee presented its report, which was printed in the January, 1935, number of the *JOURNAL*.

Position of the American Bar Association

The Foreword emphasized the position of the members that there was no opposition to the policy of effectively protecting children and of regulating their employment. The opposition was merely to the pursuance of this policy by means of a constitutional amendment rather than by local statutes. In the course of the argument, however, a more definite question was raised, that which concerned the limit of eighteen years, instead of the sixteen years of the invalidated Act of Congress. No child labor law of any state had so high a limit as eighteen years, and the point had been made by the proponents of the amendment that the amendment merely gave a power to Congress which Congress was no more likely to use than the states themselves. The Committee declared the increase of the limit had greatly enlarged the range of governmental interference within a sphere in which governmental interference should be minimized.

The meeting of the Assembly of the Association in 1936 was almost wholly given over to a debate on this question. The views expressed were intense and vigorous and the feeling displayed was strong. What was particularly noticeable was the fact that a few voices were raised to express once more the objection made more than fifty years earlier to discussions far less removed from the ordinary business of legal gatherings. These were controversial questions. What had the American Bar Association to do with the process of law-making and with reforms in our social structure?

It may be said at once that these views were those of a small minority. The members of the Bar Association, formally assembled as such, were not merely willing but eager to help determine these issues, controversial or

*The first chapters of Professor Radin's study of the Association's history were published in the November, December, January, and February numbers of the *JOURNAL*. The series will conclude in the April number.



Strauss Studio

CHARLES M. HAY

Militant advocate of child labor amendment.

not, however obviously economic or social the questions involved might be.

And the particular determination in this case was not doubtful. By a decided majority, the assemblage accepted the report of the majority and consciously threw its influence, for whatever weight it had, against the Child Labor Amendment and in favor of the Uniform Child Labor Act—an act which at that time had not been enacted in any state of the Union, since the District of Columbia had adopted it in 1928 before its approval by the Association. It may be well to say that it has since (1937) been adopted in Missouri.

Association No Longer a Passive Observer of Affairs

The importance of this entry of the Association into matters of such high public moment cannot be overestimated. Whatever view is taken about the soundness or the unsoundness of the conclusion of the Association, the action marks more decidedly than any previous vote a new epoch in which the Association has discarded the role of a passive observer of affairs or that of a mere group of technical administrators of law, and has assumed a definite part in the entire complex of forces that create our law as well as apply it.

This contact of the Association with what may be called an outside world was certain to produce conflict. Whatever might be the prevailing view among the industrial and commercial leaders of the country, the opinion of a distinct majority among those most articulate on the subject was strongly opposed to the view of the Bar Association.

The vote of the Bar Association was attacked in some cases as an unwarranted intermeddling in matters that did not concern the profession. It is curious that this

attack came from men who were ready enough to attack the lawyers as a class for their lack of contact with social and economic realities. It was again attacked because it seemed to place the authority of a great profession in an attitude of opposition to an important step in humane progress. And it was finally more specifically attacked as an incorrect picture of the view either of the members of the Bar Association or of the lawyers as a whole.

This last question was determined by a referendum undertaken by the Association's House of Delegates and the results were published in the December, 1937, issue of the AMERICAN BAR ASSOCIATION JOURNAL. The results were instructive. Of those voting, 10,840 voted against approval of the Amendment submitted in 1924, and 2,743 voted in favor of it.

The Association numbered at the time more than 31,000 members. There is, however, no reason to believe that the 16,000 and more who did not vote would have changed the majority proportionately. A participation of two-fifths in such cases can generally be relied on as an indication of the sentiment of the entire number.

New Child Labor Amendment

But the matter had been complicated by a new factor that undoubtedly affected the vote. Senator Vandenberg of Michigan presented a resolution in the United States Senate for a Child Labor Amendment that differed from the Resolution of 1924. The essential difference was that the age limit had been reduced to sixteen instead of eighteen, in accordance with the Federal Child Labor Statute invalidated by *Hammer v. Dagenhart*, and in accordance with the practice of nearly all the states.

Besides the 1924 Child Labor Amendment, the "Vandenberg Amendment" was also submitted in the referendum. As between the two, 11,254 preferred the Vandenberg Amendment to the earlier one, and 1,797 preferred the still pending proposal of 1924. On the direct question of approval of the Vandenberg Amendment as such, 7,729 voted in the affirmative and only 5,777 in the negative. Again on the direct question whether the matter should be dealt with by constitutional amendment rather than by the action of individual states, 7,513 voted "Yes" and 6,126 voted "No."

Referendum on Various Proposals

The significance and importance of these votes are apparent. The assertion that the Committee's report of 1935-1936 did in fact represent the views of the Association was to a considerable extent borne out, but with a difference. It becomes clear that the claim that the Association was not opposed to the principle of regulating child labor was not a mere pretense. The issue was specifically posed in two votes and was decided in favor of regulation. More than that, the reason urged in the original Committee's report was rejected. It was not because the matter infringed on the sovereignty of the states that the Association wished the 1924 Amendment rejected, but because it went somewhat too far, and made the limit of potential regulation eighteen years instead of sixteen, since in one referendum a majority declared its preference for an amendment as against a uniform law.

Evidently the result of all this discussion and debate goes far beyond the determination of whether the lawyers of the country do or do not approve the policy of

regulating child labor, even if we assumed that the thirteen thousand lawyers who voted in this referendum might properly speak for the entire profession. The significance lay—as has been suggested—in the fact that the Association took part in a movement in which the country is vitally interested. There is to be no splendid isolation for lawyers, no ideal of monastic experts sitting dispassionately aloof from the heat of controversy. Lawyers must be willing to share the responsibilities of their common citizenship. In this action the lawyers have indicated their willingness to do so, and in the Bar Association there is undoubtedly present a means of making their opinions articulate.

The entry of the Association into this form of activity has a still greater significance from another point of view. The original report opposed the Child Labor Amendment on definite grounds. It was a matter to be left to the states and to the individual families. The representatives of the Association were apparently strongly committed not only to opposition to the Amendment, but opposition based on these reasons.

Interaction Between Public Opinion and the Opinion of the Bar

It is extremely likely that the unfavorable reaction which this report created had an immediate influence on the members of the Association. A wide gap between lawyers as a group and the lay members of the community on a moral or social question was definitely felt to be unfortunate. It is impossible not to see in the change which the actual referendum has made clear in the basis of opposition to the Amendment of 1924, an attempt at approaching a point of view on this capital question which will not base itself on an abstract principle but on human needs. The lawyers of the country have accepted a responsibility which requires of them a willingness to be moulded as well as to mould.

The action on the Child Labor Amendment came to a head during the heat of the agitated controversy which the policies of President Franklin Roosevelt precipitated. These policies, collectively called the "New Deal," were opposed by most—of course, not quite all—of the persons who belonged to what is now familiarly called "the upper income brackets." To this group a great many of the lawyers who are members of the Bar Association almost inevitably belong, both on their own behalf and on behalf of those clients with whose continuing prosperity their own prosperity is bound up.

The opposition to the New Deal was not undertaken officially by the Association. The speeches delivered to the Association, the articles published in its *JOURNAL* and in its proceedings, left little doubt on which side of these controversies most of the members of the Association were to be found.

Proposal to Reorganize the Supreme Court

But a particular question arose on which the Association very much desired to express a strong opinion. This was the proposal of the President to reorganize the judiciary, and particularly the Supreme Court, in a definite way. The details of the plan may be taken to be well known. They involved an increase of the Supreme Court by six unless the judges who had reached seventy resigned. The purpose was undisguisedly that of changing the complexion of a court that had in several decisions declared many of the major elements in the New Deal legislation to be unconstitutional.

A powerful and aggressive opposition to this plan

arose from many quarters and was based on many reasons. With this opposition the Association at once and energetically ranked itself. By committees and by active interposition in all public and private discussions of it, the American Bar Association contributed materially to the forces that finally prevented the passage of the bill.

The sentiment of the public on this bill is hard to gauge. The newspapers were overwhelmingly opposed to it. But the newspapers had also—by a ratio of nearly four to one—in 1936 opposed President Roosevelt, who none the less was reelected by a vote of nearly three to two. The question was raised whether the action of the Association's spokesmen and committees represented either the entire Association or the lawyers as a whole. Once more a referendum was attempted, of which a resume is given in the May, 1937, number of the *AMERICAN BAR ASSOCIATION JOURNAL*. Eighteen thousand six hundred and ninety-five ballots were cast—a much larger number than on the previous question. Of these, 16,132 were against the proposal (86%) and 2,563 (13%) were for it. But the Association went further. The total number of lawyers in the country is roughly about 170,000. To the 140,000 non-members ballots were sent, as well as to the members. A little more than a third responded. Forty thousand and twenty-one (77%) voted against the proposals and 11,770 (22%) voted for them.

President's Plan Opposed

It may be said consequently that through the efforts of the Bar Association one-third of the lawyers of the country expressed themselves against the President's proposal, one-twelfth for the proposal, and seven-twelfths did not vote. What are we to infer from these figures? The American Bar Association officials inferred that the proportion was the same among the hundred thousand lawyers who did not vote as among the seventy thousand who did vote. There is, one must allow, a certain *prima facie* plausibility in that contention. Those who supported the Court plan declared that the abstention of a substantial majority from voting made it impossible to know the attitude of all the lawyers in the country on the subject.

But the really important result of this new activity of the organized bar was the obvious one that by it the relations of the Bar and the community have been rendered closer and more intimate and the profession of law has been provided with an instrument by which it can at any time perform its perfectly justifiable function of assisting in shaping the policies of the country.

The opinion of the bar on the matter of the regulation of child labor as it was originally phrased was, it can scarcely be doubted, at variance with that of the community as a whole. Whether this was also true of the opinion of the bar as finally expressed in the referendum is open to question. On the matter of the court organization, it may be said that the popular view has not been ascertained, even if that of the lawyers is declared to be known. Writing as one who voted with the minority on nearly all the referendums presented to the bar, I can only welcome the newer attitude that brings the Association within the sphere of actively sharing in the stirring changes of an exciting epoch.

To raise the standard of the legal profession, to improve the administration of the law, to destroy the barriers between the lawyers and the public, these are lofty objectives toward the attainment of which a real progress has been indicated in the sixty years of the

history of the American Bar Association. The future undoubtedly imposes a duty of further and unceasing progress in the same direction.

CHAPTER X

REORGANIZATION AND REPRESENTATION

THE American Bar Association, at the time that Simeon Baldwin planned and organized it, thought of itself as a "representative" body and it was such a body in the older sense of the word "representative." It was composed of persons who came from nearly every one of the United States and who were engaged in almost every type of legal practice known in the United States. These persons had some claim to understand the needs and problems of the entire profession. They were, it is true, self-constituted, but so were many other bodies which in the early history of our institutions, claimed to be "representative" and acted as "representatives" of the whole people.

But of course, in the more modern acceptance of the term, the American Bar Association was not a representative body at all. It could and did speak "for" and "on behalf of" all the lawyers of the country. But it could obviously not speak "with the authority of" all the lawyers of the country. It could not do so if for no other reason than that the lawyers of the country

were many and the members of the American Bar Association were few, while those members who attended the annual meetings were still fewer, and it was in the proceedings of these meetings alone that the Bar Association was articulate.

The American Bar Association, it was asserted, was a club of gentlemen who possessed sufficient means to leave their occupations once a year and travel great distances at considerable expense. Obviously, when they spoke collectively they spoke with authority, but it was the authority of wealth and respectability. Whenever it was necessary to know what the lawyers thought, it was unsafe to infer it from statements that issued from the Association. John W. Davis in 1923 hoped the Association was destined to be "the accredited voice of the united bar of the entire country." But neither in 1923, nor for years later, could the Association speak with this voice. It was not the united bar of the entire country, and it possessed no credentials.

Nobody questioned the fact that a small self-selected group of lawyers with more than average incomes, meeting once a year on terms of fraternal cordiality, might and could perform useful public functions. The American Bar Association in this, its earlier aspect, had performed such public functions. It had materially assisted in reorganizing the federal judiciary; it had

(Continued on page 234)



Supreme Court Room, 1810-1814 and 1819-1860.

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

Court Punishes Lawyer for Changing a Record

IN the case *In re Murray*, 24 N. E. (2d) 288, the Supreme Court of Indiana held an attorney in contempt who changed a transcript to be used on appeal. The attorney had complained to the presiding judge that the transcript did not truly state the facts as to the Court's disposal of a plea in abatement. The judge stated that if the record did not speak the truth it should be made to do so. Claiming that he thought the judge had authorized him to change the transcript, he altered it in the presence of the Court reporter. The Court said:

"We could not too severely condemn the conduct of any member of the profession who would stoop to the changing of a public record. The integrity of the papers and proceedings pertaining to the business of the courts is essential to the administration of justice and a proper respect for law and order. There are ample precedents for disbaring lawyers who commit offenses of this character. The evil consequences that may follow such derelictions of professional duty are illustrated by the fact that in the instant case the unauthorized tampering with the transcript might have resulted in a serious miscarriage of justice, had the facts not come to the notice of the court in time to recall the opinion.

"But considering all of the mitigating circumstances, among which may be mentioned the natural handicaps of the respondent, his lack of experience, his previous good moral character and repute for ethical conduct, we have some doubt as to whether respondent realized the serious consequences of the wrong he committed or had the criminal intent which is of the essence of an offense of this character. In the exercise of the sound discretion with which we are clothed, we have therefore concluded to temper considerably the punishment that otherwise would be inflicted.

"The respondent, Milo C. Murray, is adjudged to be guilty of a direct contempt of this court, and he is hereby publicly reprimanded for his contemptuous conduct. It is further ordered that for the period of one year from this date said Murray do not appeal as counsel in any cause before this court, and that he pay the costs occasioned by this proceeding."

Oklahoma Supreme Court Holds Legislative Act Conferring Diploma Privilege Invalid

The Supreme Court of Oklahoma, in the case *In re Bledsoe*, 97 P. (2d) 556, dealt a blow of far-reaching implications to legislative control over admission to the practice of law.

Bledsoe filed his application for admission to the Bar, contending that he was entitled to a license to practice law without the necessity of taking a written examination to determine his qualifications. He based his contention upon:

"the provisions of Section 4, Article 1, Chapter 22, Session Laws 1939, which Act became effective on July 28, 1939, 5 Okl. St. Ann. §15. Section 4 provides as follows: 'Any graduate of any "Grade A" law school as recognized by the Association of American Law Schools, National Association of Law Schools, or the American Bar Association, or by the Supreme Court of the State of Oklahoma, shall be admitted to the practice of law in the State of Oklahoma, without examination upon motion, by the Supreme Court of the State of Oklahoma, upon presenting to such Court a diploma of such graduation and evidence of good moral character; "Grade A" law school as used in this Act shall mean and include any school which is a member of the Association

of American Law Schools, National Association of Law Schools, or the American Bar Association, or by the Supreme Court of the State of Oklahoma; any applicant for admission, under the terms of this Section, shall pay the same fee required of other applicants for admission.'

"Under the provisions of said section the applicant, a graduate of the Tulsa Law School, would be entitled to admission to the Bar upon motion without examination. The question presented here is whether or not the provisions of said Act contravene any provision of the Constitution."

The sum of his argument was as follows:

"The Constitution of Oklahoma does not deprive the legislature of the right to prescribe qualifications for the admission of lawyers to engage in the practice of law in this state and there being no prohibition in the Constitution, the legislature has a right to prescribe the qualifications."

The Constitution of Oklahoma provides as follows:

"The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."

After discussing several leading cases, the Court said:

"In the light of the authorities to which we have referred, which clearly represent the overwhelming weight of authority, the above quoted legislative Act cannot stand. Insofar as section 4 of the Act is concerned the same does not purport to set out minimum qualifications, but instead fixes a maximum qualification and removes from the court the power to determine whether or not a certain group or class of persons possess qualifications which entitled them to admission to the Bar. The Act of the Legislature has the effect of attempting to qualify certain persons for admission to the Bar, which is in excess of the legislative power."

Unauthorized Practice Committee Propounds Questions Concerning Relations Between Lawyers and Life Underwriters

The Unauthorized Practice Committee presented to this Committee at its last meeting, a number of questions relating to relations between the lawyers and life underwriters. The Committee condemned all of the following practices:

1. A life underwriter recommends a certain transaction, for example, the purchase of business life insurance. The client presents the proposed transaction to his attorney for approval or disapproval. The attorney then demands of the life underwriter, as a condition for his approval, a share in the life underwriter's commission.

2. An attorney promises a life underwriter to recommend him to the attorney's clients, provided the life underwriter will pay to the attorney a share of his commissions resulting from any business obtained from the lawyer's clients.

It should be noted, in this connection, that in most of the States participation in the commissions on life insurance contracts by any person other than a duly licensed life insurance agent, has been condemned by statute or by court decision and has been declared un-

ethical for life underwriters by their professional organizations.

A life underwriter proposes a certain life insurance plan to a prospective client; the client submits the proposed plan to his attorney for his legal opinion. The attorney approves the plan, but for reasons of personal advantage to himself advises the client to divert the business and to purchase the necessary life insurance not through the underwriter who submitted the plan but through another underwriter whom the attorney recommends although the interests of the client do not require such substitution.

4. An attorney promises an underwriter that if he, the underwriter, will induce his clients to refer legal business to the attorney, the attorney will pay to the underwriter a share of the fees resulting from such business.

5. To advertise himself and to promote his sale of life insurance, a life underwriter desires to use a lawyer's legal opinion in relation to a specific plan by using the lawyer's name and opinion in a general circular or as a selling document. At the underwriter's request, a lawyer furnishes such an opinion knowing (a) that the attorney's name will be thus advertised and utilized by the underwriter and (b) that the opinion may mislead the person to whom it is exhibited to his detriment unless it is adapted to the facts of his particular case. This form of business solicitation by life underwriters has been condemned by their profession and by this Association's Committee on Unauthorized Practice of the Law.

Another Advertising Device Condemned

The lawyer's desire to increase his business is a natural one, and it cannot be surprising that within permissible limitations lawyers are willing to use any promising means of bringing themselves into contact with prospective clients. Hardly less interested than the lawyers themselves are those who conceive and offer for sale to lawyers means that promise to bring clients to their offices.

The latest means that has been brought to the attention of the Committee on Professional Ethics and Grievances is a "Robot Map Service." The lawyer's professional card is mounted along with cards of others in an illuminated cabinet. A button adjacent to the card is pushed and a point is lighted on the map which shows the subscriber's location with reference to the place where the particular map is located.

The Committee held that a subscription to such a service is a form of advertising forbidden by Canon 27.

Neighborhood Law Office Must Be Controlled by Organized Bar

For some time there has been a good deal of discussion of the extent to which the low income section of the public needs, but does not receive, legal service. In discussions of the problems caused by the assumed overcrowded condition of the legal profession, it is often suggested that consideration of means of relieving this congestion should await an ascertainment of the extent to which the legal service that is needed is not now being supplied. The plights of the unusually low income lawyer and the low-income member of the public in need of legal service are such as to suggest that they need to get together. The low income lawyer is the concern of the whole profession, whether he is capable and reliable or not. If he is incapable or unreliable, and this can be known, even if the profession cannot find a way generally to eliminate him, it cannot

be enthusiastic over the prospect of an increase of his relationship with the public, particularly with ignorant people who often sorely need legal service. Hence, any special plan the organized legal profession approves for the supply of legal service to people of low incomes must concern itself with means of selecting the clients to be served as well as the lawyers who serve them.

Two Plans Disapproved

The Committee on Professional Ethics and Grievances has had submitted to it for its consideration and approval two proposals looking toward the supply of legal service to poor people.

One plan was to be operated by "several members of the Bar" and was referred to as a "legal clinic for the purpose of ministering to the low income portion of our population." It was said that the plan would not interfere with the regular practice of law. The operators would act on their own knowledge as to whether an applicant could pay more than nominal charges. If he were a chiseler, the regular fee would be charged, or the case turned over to other practicing attorneys.

The other plan stated that six or eight lawyers propose to form a partnership and establish a neighborhood law office to furnish legal services to indigent people "who are unable to pay the regular fee." Minimum charges of \$1 and \$5 are to be made respectively for advice and appearance in court. The participating lawyers are to take regular turns for office days and hours and the number, it was stated, would be gradually expanded to include "practically the majority of capable lawyers." Monthly advertisements are contemplated and the participating lawyers are to be pledged not to accept any client who comes to the office in response to an advertisement on a regular fee basis. Clients able to pay regular fees "would be referred to their respective attorneys."

The Committee disapproved both of these plans, because not connected with or controlled by an organized bar association.

Question of Advertising

The problem as to whether such an organization should be permitted to advertise must ultimately be determined. If such agencies are fully to serve the needs of the low income public, it is clear that the public to be served must be made aware of their availability. Yet the Canons now clearly forbid advertising. If it is finally decided that the advertisement of such agencies is desirable, it may be necessary to amend the Canons.

One plan that had been noted contemplated the formation of a corporation to operate a neighborhood law office. Capable attorneys would be employed on a salary. According to presently accepted notions, a corporation should not be permitted to practice law. Some plans contemplate that the lawyers who participate in the plan shall personally render the services; others contemplate a reference of eligible clients to a selected roster of lawyers. Each of these plans presents problems.

As to the first, may the lawyers select themselves and determine how many participants there shall be? By whom, if by any one, will they be supervised? What disposition shall be made of profits, if any? How will losses, if any, be met?

As to the second plan, who selects the names to go on the roster? What considerations shall limit the size of the roster? How shall supervision over lawyers on the roster be exercised?

As to each plan, the following questions will arise: How shall the eligibility of clients to receive low cost service be determined? Shall the below normal fee that is charged be uniform for the same service rendered, though the clients who cannot pay "regular fees" vary in their ability to pay?

The foregoing and many other questions are pertinent to a comprehensive consideration of this broad problem. The Committee will proceed cautiously. It has decided but one, though very important, matter relating to it. Such enterprises must be managed by and responsible to an organized bar. Care must be taken that "chiselers" do not impose upon the lawyers and the profession must see to it that the services rendered under its auspices are high grade; that they always promote the best interests of the client. And approved plans should include means of preventing an individual lawyer's using, for his personal advantage, the profession's responsibility and desire to serve the low income section of the public.

THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES,

H. W. Arant, *Chairman*

Opinions

Opinion 199

(January 26, 1940)

NEWSPAPER DISCUSSIONS OF PENDING CASES
—Canon 20 does not prohibit issuance of statements by public officials.

STATEMENTS RELATING TO PROSPECTIVE OR PENDING PROSECUTIONS—Statements relating to prospective or pending criminal or civil proceedings should avoid any statement of fact likely to create an adverse public attitude respecting the alleged actions of the defendants to such proceedings.

On May 18, 1938, the Attorney General of the United States made an announcement that the Department of Justice would from time to time issue public statements throwing light on the prosecution policy with respect to anti-trust laws. See 1938 Annual Report of the Attorney General, page 305.

Pursuant to this policy, statements were issued covering the period from May 18, 1938, to August 28, 1938. These may be found in the 1938 Report of the Attorney General, pages 306 to 334, inclusive.

They were signed by the Assistant Attorney General in charge of the Anti-Trust Division and were approved by the Attorney General.

A local bar association has asked our opinion upon the ethical propriety of these statements.

The opinion of the Committee was stated by MR. PHILLIPS, Messrs. Arant, Houghton, Miller, Drinker, and Taft concurring. Mr. Brown was absent and did not participate.

Canon 20 reads as follows:

"Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement."

The Attorney General is the executive head of the Department of Justice of the Department of Justice of the United States. 5 U. S. C. A. Sec. 291. He and his subordinates are the legal representatives of the

United States in all proceedings, both civil and criminal, in the courts of the United States in which the United States is a party or has an interest. 5 U. S. C. A. Secs. 309, 310, 315, 316. In a broad aspect the Attorney General is attorney for the body politic. Therefore, in publishing his reports and in issuing public statements for dissemination through ordinary news channels, he is reporting to the public. Herein lies a material difference between a report or a press release issued by the Attorney General and one given out by an attorney for a private client. Notwithstanding this difference, certain limitations should be regarded in giving out press releases by the Attorney General respecting pending or prospective litigation in order that the rights of the defendants, both in criminal and civil prosecutions, be neither impaired nor prejudiced.

The experienced trial lawyer knows that an adverse public opinion is a tremendous disadvantage to the defense of his client. Although grand jurors conduct their deliberations in secret, they are selected from the body of the public. They are likely to know what the general public knows and to reflect the public attitude. Trials are open to the public, and aroused public opinion respecting the merits of a legal controversy creates a court room atmosphere which, without any vocal expression in the presence of the petit jury, makes itself felt and has its effect upon the action of the petit jury. Our fundamental concepts of justice and our American sense of fair play require that the petit jury shall be composed of persons with fair and impartial minds and without preconceived views as to the merits of the controversy, and that it shall determine the issues presented to it solely upon the evidence adduced at the trial and according to the law given in the instructions of the trial judge.

While we may doubt that the effect of public opinion would sway or bias the judgment of the trial judge in an equity proceeding, the defendant should not be called upon to run that risk and the trial court should not have his work made more difficult by any dissemination of statements to the public that would be calculated to create a public demand for a particular judgment in a prospective or pending case.

An examination of the public statements and a discussion thereof with the Assistant Attorney General in charge of the Anti-Trust Division leads us to conclude that a conscientious effort has been made to regard the limitations, to which we have adverted, in the formulation of these press releases.

However, in certain instances the public statements purport to state as facts actions of persons, associations, or corporations upon which the Department of Justice intends to predicate criminal or civil actions for violations of the federal anti-trust laws. Since these statements emanate from the high office of Attorney General, it is probable that the public will accept them without qualification or reservation. They might tend to inflame the public mind and create a public attitude adverse to the defendants to such proposed proceedings prior to grand jury investigation and trial of the criminal charges and the judicial determination of the civil complaint. Admittedly, efforts have been made to avoid such results by setting forth in the press releases from time to time statements like the following:

"The commencement of a grand jury proceeding or a criminal prosecution does not do away with the presumption of innocence which surrounds any defendant. It only means that this Department is in possession of [evidence of violation of law which it deems so com-

pling that it cannot accept the responsibility of ignoring it] and must therefore present it to an impartial judicial tribunal." (Brackets ours)

But the phrase enclosed in brackets might well increase the probability of the unqualified acceptance by the public of any statements of fact in the press releases. It is one thing to state that the Department has evidence of law violation which it regards sufficient to warrant a grand jury investigation and another to state the facts respecting the acts or conduct which it regards as violations of the anti-trust laws.

Two of the statements related to pending criminal prosecutions, two were issued on the eve of grand jury investigations, one when a grand jury investigation was shortly contemplated, and one related to a pending civil proceeding.

While we see no objection to statements reflecting departmental policy, nor to statements of fact relating to past proceedings in the nature of reports, when, as here, the statements relate to prospective or pending criminal or civil proceedings, they should omit any assertions of fact likely to create an adverse attitude in the public mind respecting the alleged actions of the defendants to such proceedings.

Opinion 200

(January 27, 1940)

JUDICIAL DISQUALIFICATION—KINSHIP TO COUNSEL—A judge should, when feasible, avoid sitting without colleagues in a case in which a near relative is counsel.

PROFESSIONAL EMPLOYMENT—KINSHIP TO JUDGE—It is not incumbent on a lawyer to refuse to accept employment in a case because it may be heard before a near relative.

A member has asked the Committee to state the ethical limitations in a situation where several of the six judges in a given country have sons or near relatives who are lawyers practicing in the Court, the inquiring member stating that "occasionally a disappointed litigant, whose case perhaps had no merit, lays his defeat to the relationship between the presiding judge and the opposing counsel."

The opinion of the Committee was stated by MR. DRINKER, Messrs. Arant, Phillips, Houghton, Miller and Taft concurring. Mr. Brown was absent and did not participate.

Canon 13 of Judicial Ethics provides as follows:

"A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person."

Canon 26 provides in part as follows:

"It is desirable that he (a judge) should, as far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties."

While neither of these Canons specifically covers the situation in question, they embody the basic relevant principles.

A judge should studiously avoid wherever possible every situation that might reasonably give rise to the impression on the part of litigants or of the public that his decisions were influenced by favoritism. While the Canons do not preclude a judge from sitting in a case in which a son or other relative is counsel, it is wise in such cases for the judge, where feasible, to have another judge hear the case.



CHARLES A. BOSTON, 1863-1935

Former president of the American Bar Association; long active in work of professional ethics committee.

It is not incumbent on a lawyer to refuse to accept employment in a case because it may be heard by his father or other relative. The responsibility is on the judge not to sit in a case unless he is both free from bias and from the appearance thereof.

Achievements of the American Bar Association

(Continued from page 230)

notably stimulated the movement for uniform state laws in commerce; it had given decided help in increasing the standards for legal education; it had given definiteness to what was fundamental in the rules of professional conduct. But clearly, if the profession of the law was to go beyond these specific and more or less miscellaneous accomplishments and play the role in the development of the country which could be expected of it, the two things absent in the constitution of the only existing national body of lawyers would have to be supplied. That body would have to secure unity and it would have to provide itself with credentials.

There was also another consideration. An association that called itself the "American Bar Association" would be taken by the public to have the right to speak for the lawyers of the country, even if the Association made no pretensions to do so and even if it disclaimed such pretension. Conscientious men were necessarily concerned at the responsibility thus thrust on them. And they were more concerned if, being committed to an unqualified belief in the validity of democracy, they find themselves functioning in an undemocratically organized association.

(To be continued)

JUNIOR BAR NOTES

BY JOSEPH HARRISON

Secretary of the Junior Bar Conference

Junior Bar to Conduct Important Survey of Judicial Administration

THE Junior Bar Conference is proceeding with the nation-wide survey of judicial administration as authorized at its annual meeting in San Francisco. Pursuant to authority granted to them by the House of Delegates at Chicago in January, the Section of Judicial Administration and the Junior Bar Conference have inaugurated a factual survey to determine which of the recommendations as to judicial administration approved by the House at Cleveland are in effect in the several states.

Committees of the Junior Bar Conference are being established in the states to work under the direction of Paul DeWitt, assistant secretary of the American Judicature Society, which is also lending its aid in the work. Professor William W. Blume, of the University of Michigan Law School, is acting as Adviser.

The recommendations approved by the House were the result of intensive effort of seven committees of the Section of Judicial Administration composed of leading jurists, law teachers, and practitioners during the year 1937-8. They embraced the fields of jury selection, trial practice, pre-trial hearings, simplified appellate procedure, and procedure before administrative tribunals.

Regional Meeting at Louisville

A meeting of junior bar executives was held at Louisville, Ky., on Saturday, Jan. 27, in conjunction with a regional meeting of bar executives sponsored by the Section on Bar Organization Activities of the American Bar Association. Conference representatives from Cleveland, Columbus, Cincinnati, Louisville, and Kansas were in attendance. A delegation from Tennessee that had planned to attend were unable to do so because of the unusual snowstorms prevailing in that area. Council member James A. Gleason led the round table discussion in the morning. The next annual meeting at Philadelphia, economic conditions affecting young lawyers, the Public Information Program, membership work and mechanics of organization were the principal topics considered. Former Council member Earl F. Morris, of Columbus, Ohio, circuit membership committeeman Harry Green, of Cleveland, and Philip H. Lewis, of Topeka, Kansas, Chairman of the Conference's Committee on Cooperation with Junior Bar Groups, explained the various items of the Conference program. During the afternoon, the junior group joined the senior conferees. Mr. Gleason gave a brief report of the morning deliberations and the Conference program in general. He urged the older members to encourage and give assistance to the junior bar officers in interesting younger lawyers in their office or of their acquaintance to join the American Bar Association and become active members of the Junior Bar Conference.

New Jersey Activities

The Essex County, New Jersey, members of the Junior Bar Conference for the third year are assisting in the sponsorship of a seminar on medico-legal aspects of accidental injuries. The seminar includes a series of eight weekly lectures and question periods, the first of

which was held on Tuesday, Feb. 6. Dr. Max Kummel, orthopedist of Newark, N. J., is the lecturer. There is no charge for admission to the lectures. State Public Information Director Leon Dreskin reports that the Conference has supplied several speakers to lay organizations within the past two months. A meeting of all New Jersey local directors was addressed by National Director L. Stanley Ford, of Hackensack, N. J., on Jan. 25. In addition to the speaking program, it was agreed to arrange for naturalization and Americanization classes for those who desire to become citizens of the United States. The New Jersey committee promoting the idea of a legislative drafting and reference bureau is studying current legislation with a view to pointing out instances where such an agency would be of particular value to the public.

Downtown New York Luncheon Meeting

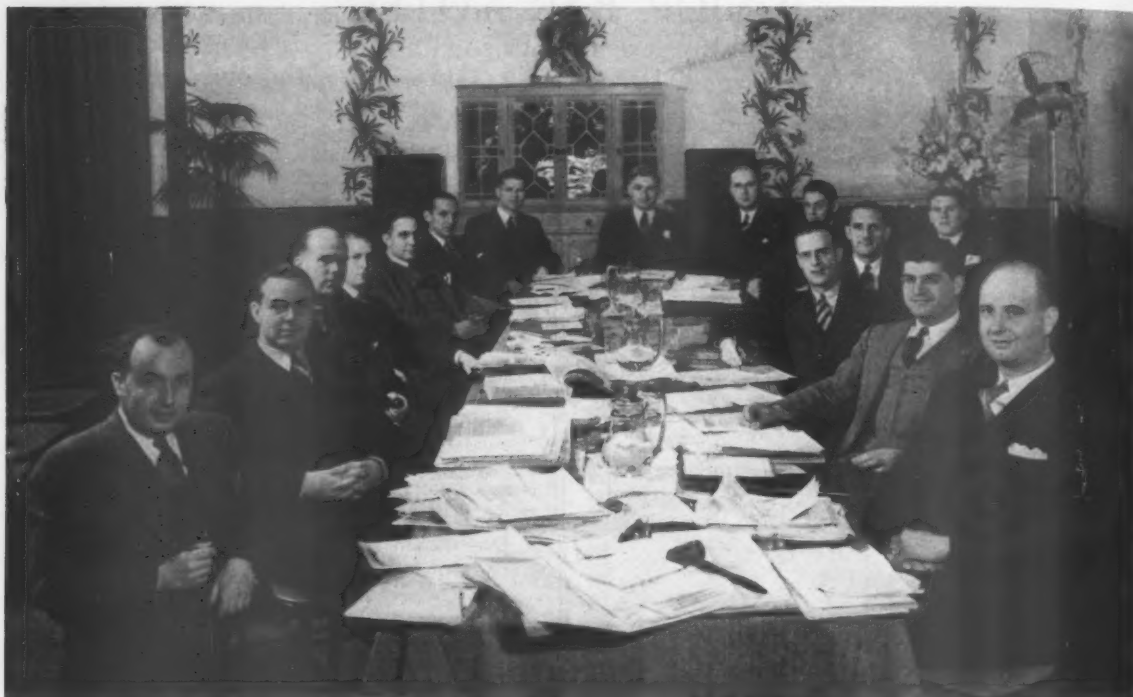
On Jan. 22, approximately one hundred young lawyers in the downtown New York area attended a luncheon meeting arranged by Frank L. Dewey and Lyndon Tondel. Mr. Dewey is in charge of membership work in the Second Circuit and Mr. Tondel is New York co-chairman for membership. Morris L. Ernst, known for his defenses in civil liberties cases, addressed the group. He pointed out the folly of the ends-justify-the-means philosophy in the denial of basic freedoms to unpopular minorities. He flayed public officials who obtained convictions by improper methods. He also reviewed the matters of censorship and suppression in public assemblies, radio, newspapers and books. Conference members were permitted to invite non-member guests. Similar gatherings are planned as monthly affairs.

Vermont Continues Legal Institutes

Vermont Chairman Osmer C. Fitts reports that the fourth of a series of legal institutes sponsored by Vermont members of the Junior Bar Conference was successfully held at Montpelier, on Jan. 27. State Commissioner of Industrial Relations Howard E. Armstrong discussed workmen's compensation law and William E. Kidd of the state tax department spoke on income tax law. Question periods followed each talk. About thirty-five young lawyers from all parts of the state attended the day session. Deane C. Davis, of Barre, addressed the group at the dinner held in the evening at the Montpelier Tavern. Robert H. Rand of Montpelier was in charge of the arrangements.

Problems of Small Litigants Receiving Attention

As part of the Conference program to aid small litigants, special studies are to be conducted shortly in three experimental states. Oklahoma and South Carolina have thus far been selected for this purpose. Particular attention will be given to a factual survey concerning the problem of persons in low income groups who may be victimized by unscrupulous agencies and who either are ignorant of their rights or are unable to obtain legal assistance. In Oklahoma, Council Member James D. Fellers and State Chairman Ben Franklin will organize the work. George Gisler, a member of the Committee on Aid of the Small Litigant, and Council Member Lewis Powell, Jr., of Richmond, Va., conferred during February with Conference rep-



Officers and Council of Junior Bar Conference in meeting with Mr. L. Stanley Ford, National Director, Public Information Program and Mr. Joseph C. Lamy, Associate Director, Public Information Program: (left to right) Joseph Harrison, Secretary, Newark, N. J.; Charles E. Pledger, Jr., Washington, D. C.; James A. Gleason, Cleveland, Ohio; Alfred T. White, New York City; Leslie P. Hemry, Boston, Mass.; Ralph R. Quillian, Atlanta, Ga.; Joseph C. Lamy, Chicago, Ill.; Paul F. Hannah, Chairman, Washington, D. C.; L. Stanley Ford, Hackensack, N. J.; Ronald J. Fouh's, St. Louis, Mo.; Howard Cockrill, Little Rock, Ark.; Harold W. Schweitzer, Los Angeles, Calif.; James D. Fellers, Okla. City, Okla.; James P. Economos, Chicago, Ill.; A. Pratt Kesler, Vice-Chairman, Salt Lake City, Utah.

representatives and members of the younger bar in South Carolina regarding the organization of the project in that state.

The broader subject of adequate legal services for persons in low income groups received special attention at the mid-winter meeting. The Conference at its last annual meeting determined to ascertain by means of a factual survey to what extent the charges of the legal profession's inadequacy in this field were justified. It was agreed that before such suggested "cures" as legal clinics or legal service bureaus were recommended or adopted that the actual need for them ought to be ascertained. The problem is a tenuous one and the means of finding the facts present some practical difficulties.

The Conference committee on this subject is headed by George F. Kachlein, Jr., of Seattle, Washington. A sub-committee of the Conference's executive council was appointed to assist the committee pursuant to action at the mid-winter meeting. Members of the sub-committee are: H. Howard Cockrill, Chairman, James A. Gleason, Leslie P. Hemry and Alfred T. White. It is expected that the reports on this subject to be submitted at Philadelphia in September will receive important consideration at the annual meeting.

(Continued from page 212)

to 56—a margin of three votes. One of those was cast by the new Representative from Nevada.

Fear That South Might Again Have Balance of Power

Throughout the war the President was pondering the problem of the reconstruction of the Union after the

victory at arms should have been won. Midway of the conflict Congress began to give serious attention to the question. A deadlock developed between the executive and legislative branches of the government. Lincoln, with all his magnanimity, could not forget that he was the titular head of a political party. As a practical politician he must have contemplated the possibility that when the votes of the reconstructed Southern States should be combined with the votes of the Northern anti-war Democrats the control of Congress might go to the men who had fought to destroy the Union or had used their influence to hobble the policies of the Administration. With the abolition of slavery the three-fifths rule in the Constitution would become merely a matter of historical interest, and the South would stand to increase its power in Congress unless the basis of representation should be altered or the power of the North should be increased. The leaders of the dominant party in Congress would see to it that the President should be reminded of these matters. New and loyal States became a primary consideration. Every new State would mean two more Senators and at least one Representative. West Virginia having been admitted, the party strategists scanned the mountains and the prairies in quest of communities that might be organized for statehood. Three Territories offered possibilities. On the day that the Enabling Act for Nevada was approved the President signed a similar bill for Colorado to qualify, and four weeks later the Nebraska bill was approved. The party in power had considered also the possibility of adding Utah, New Mexico, and Montana to the Union.

(To be continued)

THE 300-MILE NEUTRAL BELT IN INTERNATIONAL LAW*

BY PAYSON S. WILD JR.

Associate Professor of Government, Harvard University

SHOULD German submarines or pocket battleships shift operations to Gulf of St. Lawrence waters, we couldn't and, probably, wouldn't try to do anything about it. In fact, by forbidding our merchant ships from going further up the North Atlantic coast than St. John, New Brunswick, or Yarmouth, Nova Scotia, declaring that a war zone exists north of those points, we have tacitly admitted the right of the belligerent nations to battle all they wish in Canadian waters outside the Bay of Fundy; in waters, too, a great deal closer to the American coast than 300 miles.

But it must be remembered that Canada was never considered to come within the scope of the Monroe Doctrine; when that doctrine was pronounced Canada was already a colony of a European power, and still remains a part of the British Empire.

Coverage of Monroe Doctrine

However, in his speech at Kingston, Ontario, in 1938, President Roosevelt extended the coverage of the Monroe Doctrine to include the protection of Canada against invasion by any foreign power. It must be kept in mind, though, that the Monroe Doctrine is not international law, nor even American law; it is simply a policy enunciated by a President of the United States.

For two reasons, then, we have no just cause to object should Germany carry the war into Canadian waters. First, Germany is bound in no way to respect our declared policy unless she accepts it, which she has not done and certainly will not do with respect to our pretensions as Canada's protector. Secondly, our avowed policy covers only invasion of Canada; it is only just that, as Canada has declared war upon Germany, Germany should have the right to inflict any damage she can upon her declared enemy.

The most important aspect to be kept in mind is that if we, and the other nations of the western hemisphere, declare that our jurisdiction and control extends three hundred miles to sea, we must accept full responsibility for that vast area, must be able to protect our claim.

The whole claim is indefensible. In the first place, the 300-mile belt is not recognized as international law; cannot be unless all the other powers accept it, and they don't have to. In fact, both Britain and Germany have rejected it by word and deed.

In the second place, and this is even more important than the non-acceptance angle, there is not the naval power in the western hemisphere to patrol a 300-mile belt around the Americas. So how can we claim jurisdiction over a sea area that we can't even patrol, let alone protect? The United States navy could do a partial job in some areas, but the South American nations could contribute little.

Panama Canal

I do not mean by this that we are overboard any time we claim jurisdiction further than three miles out to sea. We could declare, for instance, a 50-mile neutral zone around the entrances to the Panama Canal and, probably, get away with it, for we could defend that area, make our claims stick.

As a matter of fact, we are jumping the three-mile limit today with little or no protest from other powers, claiming limited jurisdictions far beyond that zone. We have taken 12-mile jurisdiction for customs and, by our 1935 smuggling act, a 62-mile limit in smuggling cases and are getting away with it.

But, usually, attempts to widen the limit meet with protests. There were numerous protests when we established the 12-mile limit in the rum-running days of national prohibition. Back in the 90s, we claimed jurisdiction hundreds of miles out to sea in the north Pacific for protection of the dwindling seal herds. Our position proved to be untenable until we had strengthened it by international treaties.

That's another important point; it takes international acceptance, usually, to make effective any divergence from international law. We got that international acceptance in the sealing case, but we have not received it for the 300-mile limit.

Nor do I believe it to our own best interests to accept jurisdiction of any such vast area. A 300-mile neutral zone around the Americas sounds like something most desirable, at first consideration. But people forget that with claims to rights goes the responsibility for maintaining those rights and protecting the interests of other nations within the area of jurisdiction. Could or should we assume such responsibility so far out to sea?

Responsibility for Jurisdictional Claims

During the 16th and 17th centuries, Great Britain, Spain and Portugal claimed jurisdiction over half the oceans of the world. Also, in ancient times, an encyclical of Rome divided the entire Atlantic between Spain and Portugal. But these assertions were given up because it soon became impossible and impractical to support the claims. And this will undoubtedly be the case whenever any nation or nations attempt jurisdictional claims they cannot defend.

As for the *Graf Spee* and the British cruisers, so far as could be learned from the news dispatches, all concerned conducted themselves strictly according to international law. There is nothing in the law to prohibit engaging the enemy anywhere outside the three-mile limit.

However, there is one proviso, accepted by all nations, that limits warfare anywhere within gunshot of a neutral coast. The battle must be conducted so that shells do not menace the neutral or its shipping. It is this proviso that would, probably, warrant us in protesting against the war zone being extended into the

*From an interview with Professor Wild in the *Boston Sunday Post*, Dec. 24, 1939, by permission of Professor Wild and the *Post*.

Bay of Fundy; any battle there would be a distinct menace to the coast of Maine and American shipping.

But we would not be on solid ground in protesting because the British warship chased the *Arauca* into Port Everglades. Nor can I see that it's any of our international business if the scuttling of the *Columbus* was carried out because of imminent capture by a British destroyer, even if the episode did occur well within the 300-mile zone. Neither encounter menaced us or our shipping in any way.

Take it all around, it doesn't seem to me that we'll get very far in trying to keep the war very much farther than three miles off shore. That doesn't mean, though, that we must hold tightly to every accepted tenet of international law. In fact, we don't.

The Graf Spee

The very situation that occurred when the *Graf Spee* found refuge in Montevideo harbor is one about which there is a very great divergence of opinion and our view of what is just and proper in such a case is different from that of most other nations.

International law decrees that a ship of war may remain in a neutral harbor for twenty-four hours or, in case she has been damaged by either the elements or battle, for a length of time necessary to make her seaworthy.

So, in Montevideo harbor, the *Graf Spee* had the certain right to remain for twenty-four hours and as much longer as was necessary to make her seaworthy. And, according to all the traditions of international law, it was strictly up to the Uruguayan authorities to decide just how much time the ship should be given.

The line dividing repairs in the interest of seaworthi-

ness and those that will make for greater battle-worthiness is a fine one. For twenty-four hours, according to international law, the *Graf Spee's* crew could busy themselves at any sort of repair they wished, even to making guns fit for battle. But after that period nothing could be done except what would make her seaworthy.

American Rule is Simple

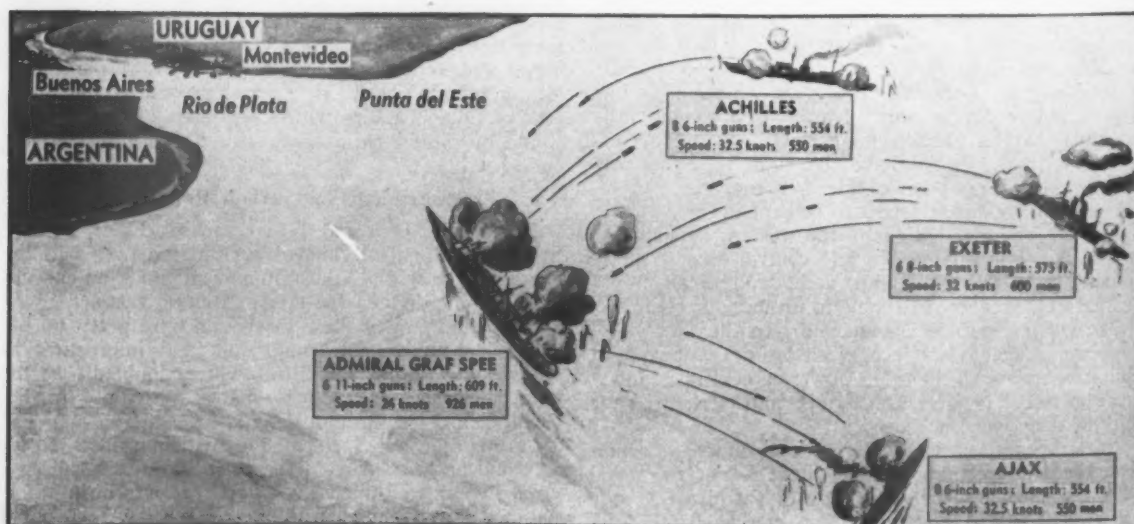
But aren't repairs to damage sustained in battle really jobs that build up fire-power, too, as well as seaworthiness? There are lots of questions such as this that arise. The United States has solved them all in one measure.

If the *Graf Spee* had come into Boston instead of Montevideo, she could have remained twenty-four hours, and no longer, without internment. Nor could any war craft of any belligerent nation. In short, the United States has decreed that battleships of nations at war can remain in an American harbor, without internment, for only twenty-four hours, no matter what the ship's condition.

It's either get out in twenty-four hours or stay for the duration of the war. Only such repairs to ship or armament as can be done in that period are allowed.

But had the *Columbus* sought refuge in an American port, as the *Arauca* did, instead of running for the open sea, she could have remained indefinitely; that is, merchant ships of warring nations can stay in our harbors as long as they wish without any risk of internment.

We recognize the right of merchant ships to arm to defend themselves. So long as they are essentially cargo ships, not belonging to the navy, they can find refuge in our ports as long as they want to stay, no matter if they do have guns mounted on their decks.



AN ARTIST'S CONCEPTION OF SOUTH AMERICAN NAVAL BATTLE

A naval battle in South American waters forced the German pocket battleship *Graf Spee* to seek the harbor of Montevideo, Uruguay, for repairs. The British cruisers *Exeter*, *Achilles*, and *Ajax* kept a lookout when the *Graf Spee* put out again to sea to renew the battle. The cruiser *Exeter* was the most seriously damaged of the three British ships. The above photo is an artist's conception of the battle.

Acme

THE FRENCH BAR AND THE WAR*

BY FERNAND PAYEN

*Président de l'Association Nationale des Avocats de France,
Ancien Bâtonnier du Barreau de Paris*

THERE are about six thousand members of the Bar in France, of which two thousand four hundred live in Paris. In 1914, about one-half of the members of the Bar were called to the colors. The Bar of Paris alone furnished one thousand and seventy-five soldiers, of which two hundred and twenty-eight did not return.

The proportion of those called to the colors this time is about the same: Half of the lawyers of France have put aside their toque for the steel helmet,—have changed their robes for the uniform of a soldier,—have deserted the Court House to go forward to places less peaceful, to uphold a great principle: that of the independence of nations and the liberty of mankind.

Our lawyers can be found today serving in all branches of the army: infantry, cavalry, artillery, marine, aviation, general headquarters, "intendance," etc. Many of these, during the time of peace, followed the courses of military preparation and fulfilled the period of training provided by the army. These are now officers—officers of all grades from Second Lieutenant to Colonel; the others are simple soldiers or non-commissioned officers.

To all of these, the war has caused a very great loss: I do not speak from the point of danger from service at the front,—all of the men in uniform from every walk of life are equally exposed; they suffer in this respect in exactly the same degree. Yet a tradesman or a manufacturer can perhaps keep open his store or factory; the articles which he sells and the products which he manufactures may still find purchasers. The profession of lawyer, however, such as it is practiced in France, implies, on the contrary, an individual activity; there are no partnerships among lawyers. A client selects a lawyer as he selects a doctor, because he has obtained good information about him personally, about his method of curing or operating. It is in him only that he has confidence; to this can be added that in France a great number of lawyers live entirely or nearly entirely—both themselves and their families—on the legal fees which they earn. What, therefore, is to become of their wives and children? What will become of them when the war is over? Will they not find their various clients scattered and lost?

The French Bar Associations have provided for this situation in a great effort of mutual aid and fellowship and this, I think, deserves to be specially noted: Any lawyer called to the colors can arrange to have himself replaced by another member of the Bar not so called; if he himself does not choose this lawyer to take his place, this duty falls upon the President of the Bar Association who appoints one or more for this purpose.

On this occasion, as in 1914-1918, the President has met with an embarrassment in the matter of choice because of the numerous offers for service which have

been made. The substitute lawyers receive the clients of the lawyers mobilized; they carry out or complete the preparation of their files; they argue the cases in their place and stead,—all of this very often without compensation.

It should be understood that in certain Bar Associations the substitute lawyer is authorized to keep a part of the fee in order to cover his out-of-pocket payments and overhead expenses,—which is only fair and just. But in some Bar Associations, as is the case for the Bar of Paris in particular, the totality of the fees must be paid to the mobilized lawyer or to the family which he has left; this rule is applied in all cases, except when otherwise provided for in a special agreement between the regular lawyer and his substitute.

But what would happen in case war should last a long time? Will not the clients of the mobilized lawyer forget the path to his office? If they are satisfied with his substitute, will they not continue to place their confidence in the latter and after the war still go to him for advice?

It was agreed upon in 1919, and will be agreed upon again—you can be sure of that—in . . . ? that the substitute lawyer will in no case keep the clients of the regular lawyer. In so doing, the French Bar Associations will show once more, in addition to their ardent patriotism, the traditional spirit of fraternity which has always existed between their members.

* * *

But another thing deserves to be pointed out to the honor of the French Bar Associations: I mean the efforts which they have made since the last war to develop a spirit of peace throughout the world. As far as possible, during these last twenty years, they have labored to bring about a feeling of friendship and understanding between the nations of the world. I had the honor of bringing this to the attention of the American Bar Association in 1931, when I represented the Bar of Paris at the Annual Meeting of that great Association in Atlantic City.

Always faithful to this principle, French lawyers were among the promoters of the "Union Internationale des Avocats" which has gathered into its organization the representatives of more than twenty nations.

In our own "Association Nationale des Avocats de France," on all occasions when we have met, we have welcomed lawyers of all countries and this has created a friendly feeling between the members of our Bar and the Bars of other countries. Almost every country—not every one of them unfortunately: no strong tie could ever be brought about between the French lawyers on the one side and the Russian or German lawyers on the other. The conception of individual rights and principles of duty towards the State, the fundamental belief in the liberty and the dignity of human rights, were too far apart . . . this can be seen, alas, today!

*Translated for the JOURNAL by Mr. Pendleton Beckley of the Paris bar; member of the American Bar Association.

AMERICAN BAR ASSOCIATION JOURNAL

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THE SUPREME COURT OF THE UNITED STATES

A century and a half of liberty under the law has given men a better and surer direction than they have ever had before. For the first time in world history a section of mankind has had a long period of a rule that has promised orderly government, along with a very full measure of freedom for the individual, a promise which, deferred and thwarted and played with, has yet been fulfilled in divers ways. That it comes ever nearer to full fruition is due not less to the far-sightedness of those who set our courts at the center of things, than to the wise and manly self-control of citizens, which has left the judges independent and free. Those who sit securely in the judgment-seat reflect the greatness of the country that has put them there. A lesser nation could not have produced Marshall, Taney, or Hughes, nor could those Chief Justices have been so great if they judged a lawless or a servile people.

The stream runs by unceasingly, yet it is the same stream. So the Court, changing as its membership has changed, changing a little from day to day, as all things human do, remains yet the same Court: the Court of Marshall and Story, the Court of Taney and Miller, the Court of Waite and Fuller and White and Taft—shall we not say the Court of Hughes?—the judge who, in good report and evil report, has carried the Court's name high and its shield untarnished, maintaining the Court at its high-

est point for service in a day of extreme stress, where the statesman in the Chief Justice has been needed to fulfill the whole duty of the judge.

The life of the Court has not proceeded on an even level. The Court has had its ups and downs, sometimes more esteemed, sometimes briefly less esteemed, shaken once by war, disturbed, but not often, by politics, beginning at its lowest point of prestige and influence, reaching in our own time perhaps its highest level of popular support. The people will always rally to the Court. It is the bearer of the standard, to which all good men repair in time of trouble.

Although the Court has commanded the services of a long line of able men, it has an existence apart from its individual members. It is an institution, permanent and enduring, not subject to the vicissitudes of man's life. The young lawyer, the young citizen, accept it unquestioningly. As they grow older, and learn the lessons of history and life, they but understand more fully the deep qualities of the American judicial establishment. They know the Court better, and revere it more. It is of prime importance that the membership of the Court, for its century and a half, has not been drawn from a pre-ordained official class, but, in general, direct from the bar of the country. Thus the Court has kept closer to the people.

The instincts of a great people are rarely wrong. Americans have never doubted the wisdom of the fathers who set the judiciary as the keystone of the arch of government. They were consummate statesmen, who knew the human heart and the weaknesses of men and systems. The legislator has to fight for his existence; he is rightly praised for the high devotion which he gives to the public service, but he is necessarily at frequent intervals a candidate for office and a partisan. The executive (all observers have noticed—Bryce and Woodrow Wilson and the rest) has something of the same life. He is constantly called on to reconcile two things that war within him, for he is at once President of the United States and leader of his political party. The Supreme Court judge is removed from party strife. He has an eye single to the discharge of his duties on the bench. Arguments have raged for and against the power of the Supreme Court to say the last word of constitutional interpretation. It is unnecessary to cut deeper than this: that upon a difference of opinion among the three great coordinate branches of government, unless we are to have anarchy the final word

must rest somewhere, and reflection upon the best arrangement has sustained the long and unbroken practice of the American people in leaving this decision to the courts. Necessity has solved this problem, so difficult in theory, so simple in its practical workings. Chief Justice Gibson of Pennsylvania in 1825 opposed the view that his court had power to declare an act of the State legislature unconstitutional, but twenty years later he announced that he had changed his opinion, for two reasons: first, that the people, with full knowledge, had sanctioned the doctrine by allowing it to go on, although a constitutional convention had given them the opportunity for a change; and second, "from experience of the necessity of the case."

The Court, it is very true, is made up of human beings. But a judge, and a man placed in judicial office, are not synonymous. The office sets the man apart, and ennoble him: not with the worldly trappings of nobility, but with the visible mark on his countenance of the new aspect of the inner life, a life of humility of spirit, the spirit of learning and serving, and yet of high resolve. Thus, when a lawyer leaves the arena, and is elevated to the bench, his devotion to the public interest tends to become the dominating force in his life, and his personal opinions and prejudices fall into the background, so that we find the liberal judge forward in conserving what is good, and the opponent of change moving on to a more advanced position as he sees the public need for progress. The temper of the Court changes, and that is well, for economic and social developments call for recognition; but the change is not sudden, and that too is well.

The Court we now have may be taken to be the fourth 'new Court' (the correlative of Story's sad phrase, with the era of Taney and the police power doctrine and control by State and nation of the too-powerful, just at hand!). Each of the other 'new Courts' has been linked with the name of a president, of course—the first court, with Washington: then the 'new Courts' of Jackson and Lincoln, and now a Court associated with the name of Franklin D. Roosevelt. The 'new Court' of today commands our full allegiance. "The Queen's government must go on," said an old English statesman, a century ago, and the Supreme Court goes on. Every lawyer in the United States is its faithful officer, devoted to its service, making its great achievements known to old and young, loyally bespeaking for the Court the respect and affection of all the American people.

A CODE OF EVIDENCE

Progress made so far indicates that the American Law Institute was well advised in selecting as one of its major undertakings the preparation of a model code of evidence.

Logically this seems the next step after the Rules of Civil Procedure. Parts of it will, no doubt, be valuable by way of implementing the rules as to subjects with which the Advisory Committee did not feel that it was authorized to deal. In any event it will serve as a needed model for state legislation.

One prominent characteristic of the movement is that it is intended to suggest not merely a statute, but also a set of rules of evidence, in such form that there will be available a draft suitable either for enactment by legislatures or for promulgation as rules of court, according to the policy of each jurisdiction.

The preparation of such a code is a task entirely distinct from the Restatement, but of a kind in which the Institute has had previous experience. It has already prepared an excellent model Code of Criminal Procedure.

Primarily responsible for the presently projected Code are Professor Edmund M. Morgan of the Harvard Law School, Reporter, and Dean John H. Wigmore, Chief Consultant. They are being aided by a strong group of advisers drawn from various law schools, from the benches of the United States Circuit Courts of Appeal and state courts of last resort and from the bar.

It is anticipated that substantial parts of the proposed code will, in turn, be submitted to the Institute itself at its May meeting at Washington.

It is important to crystallize the rules of evidence in a code. It is especially important to select the best when there are several varying rules. However, a more important question inevitably arises and must eventually be decided. This is the extent to which long accepted rules will be reversed when found to make for injustice or to be unsuited to modern needs. The decision of this question will require great tact and excellent judgment if the result is to receive the sanction of the bar.

But if changes are confined within proper limits and the reasons underlying them are sound, there need be no fear. The cordial reception accorded the Rules of Civil Procedure and the many reforms approved and advocated by the American Bar Association in recent years has demonstrated that he who insists that the lawyers as a whole are reactionary and not progressive speaks without knowledge.

JUDICIAL CONFERENCES—SIXTH AND EIGHTH CIRCUITS

TWO successful judicial conferences for the federal judiciary in the eighth and sixth circuits respectively with participation in each instance by representatives of the bar have marked the beginning of the first full calendar year in which the bill creating the Administrative Office of the United States Courts will be in operation. The bill provides for these conferences, and specifically calls for the presence of members of the bar and of all federal judges in the circuit, "for the purpose of considering the state of business of the courts and advising ways and means of improving the administration of justice within the circuit."

Eighth Circuit Conference

Judge Kimbrough Stone of the eighth circuit held his open conference on Jan. 5, in the Little Theatre of the beautiful Municipal Auditorium in Kansas City, where sessions of the Assembly were held during the 1937 American Bar Association meeting. Present were all federal judges in the circuit except two who were unavoidably detained, nine United States attorneys or their assistants, representatives of three state supreme courts, seven state and local bar association presidents, a referee in bankruptcy, five representatives of approved law schools in the circuit, and a few members of the Missouri bench and bar. A session of the judges on the previous day had discussed among other topics the question of indeterminate sentence, the desirability of giving the Court of Appeals the right to increase or decrease sentence, and the matter of instructions to juries. Judge Stone inaugurated the open meeting of the conference by welcoming those present and calling attention to the objects and purposes to be attained. He then recognized Circuit Judge John B. Sanborn of St. Paul, Minnesota, who read a memorial to the late Justice Pierce Butler of the United States Supreme Court which was unanimously adopted by the assembly.

Judge Orie L. Phillips' opening address at the Conference has already been published in the JOURNAL.

The subject set for discussion at the meeting related to the manner in which future conferences could most effectively aid in the accomplishment of the purposes set out in the bill. The leader of the discussion was Judge A. K. Gardner of Huron, South Dakota, member of the Circuit Court of Appeals.

The entire remainder of the session was devoted to a discussion by individual members of the assemblage of matters involving the courts. A banquet was given to the judicial conference in the evening by the chamber of commerce of Kansas City. On the last day of the meeting another closed session was held in which the state of the dockets in the various courts was discussed. There were present at the conference all of the judges of the Circuit Courts of Appeals and all of the district judges within the circuit except Judge Munger and Judge Davis.

Sixth Circuit Conference

The first annual judicial conference held in the sixth circuit was called to order by Senior Circuit Judge Xenophon Hicks, in the courtroom of the Circuit Court of Appeals in Cincinnati, on Jan. 12. All federal judges in this circuit except two, who were ill, were in at-

tendance, and in addition the presidents of three of the four state bar associations in the circuit represented the bar. The meeting lasted two days. It included a luncheon given by the circuit judges and a dinner by the Cincinnati Bar Association in honor of the conference.

Rules for subsequent conferences were adopted which provided for inclusion in the conference of the president of each state bar association in the circuit and two lawyers to be appointed by him, all United States attorneys in the circuit, and representatives of each law school approved by the American Bar Association.

Following the conclusion of the program of addresses and active discussion concerning several proposals, a report was made by the senior district judge in each district concerning the state of the docket of his court.

The dinner given by the Cincinnati Bar Association was presided over by President Charles E. Weber, who assigned to Judge Hicks the duty of introducing the speaker of the evening, Honorable John Biggs, Jr., Senior Circuit Judge of the Third Circuit. Judge Biggs spoke on "Some Aspects of Civil Liberties and the Law."



Harris & Ewing

HON. JOHN BIGGS, JR.

Judge of the United States Circuit Court of Appeals,
Third Circuit

REVIEW OF RECENT SUPREME COURT DECISIONS

Confessions of Guilt in Criminal Case Held Not Admissible Under Circumstances Indicating Compulsion—Review by Court of Appeals of Administrative Action under Communications Act is Judicial, Not Revisory—Labor Relations: Scope of Review Permissible to Court of Appeals—When Statute is Amended Pending Appeal, Amended Statute Must be Given Effect by Reviewing Court—State May Not Tax Gasoline in Interstate Vehicle, Above Amount Used in State—Citizens of State May be Taxed at Higher Rate on Bank Deposits Outside State—Taxability of Transfers Inter Vivos Does Not Depend on Technical Forms of Contingent Interests—New York City Sales Tax on Coal Held Valid—Government Consent Required for Suit on Postmaster's Bond—Liability of Director of National Bank on Note Given for Unlawful Purchase of Stock—Intra-State Telephone Rates—Eminent Domain—Garnishment of Federal Instrumentalities—State Safety Regulations in Federal Area—Federal Estate Tax: "General Power of Appointment"—Taxability of "Alimony Trusts"—State Tax on Gross Earnings of Railroad

BY EDGAR BRONSON TOLMAN*

Confessions of guilt made after protracted questioning, confinement, and circumstances indicating compulsion and fear, are not admissible in a criminal prosecution. Confessions so made offend against the constitutional guarantee of due process.

Chambers v. State of Florida. (No. 195, decided Feb. 12, 1940).

One Robert Darcy was robbed and murdered in Pompano, Florida, under circumstances which aroused great and general public indignation. Within twenty-four hours after the crime from 25 to 40 negroes living in the community, including the petitioners, were arrested and confined in the county jail. For several days they were questioned singly and repeatedly by the sheriff, a convict guard, and deputies. At the end of an "all night vigil" the State's Attorney was called from his home with the information that there had been a confession, but after hearing it the State's Attorney declared it was too vague and unsatisfactory. The questioning continued and later the state officials informed the prosecutor that "they had got something worth while." He came and his questions and the answers were taken down stenographically and transcribed and were later utilized by the state to obtain the indictment of the four petitioners, and introduced in evidence before the jury.

Soon after the indictment they were arraigned, two of them pleaded guilty and two not guilty. One of them later withdrew his plea of not guilty and pleaded guilty. All four were found guilty by the jury and the court sentenced them to death. The Supreme Court of Florida affirmed the judgment.

"From arrest until sentenced to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the sunrise confessions."

The opinion of the court was announced by Mr. JUSTICE BLACK.

(Note: All Supreme Court decisions rendered from the recessing of Court on Jan. 15, 1940 up to and including Monday, Feb. 12, are reviewed or summarized in this issue of the JOURNAL. On Feb. 12 the Court recessed to Feb. 26.)

*Assisted by James L. Homire and Leland F. Tolman.

The State of Florida challenged the jurisdiction of the court to look behind the judgments and reexamine the questions of fact passed upon by the jury. On this point Mr. JUSTICE BLACK said that the use by a state of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment and that since the petitioners allege a violation of the right to have their guilt or innocence in a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, the court must determine independently whether petitioners' confessions were so obtained and for that purpose might review the facts upon which that issue necessarily turns.

In regard to the scope and operation of the Fourteenth Amendment Mr. JUSTICE BLACK declared that while there have been controversies in relation to that amendment there remained little doubt that

"it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny."

The learned justice traced the origin and history of the Fourteenth Amendment from its earliest days and cited from the decisions of the court in cases where it had been shown that pressure had been exerted to procure involuntary confessions and in which such conduct had been declared to be "revolting to the sense of justice" and "a clear denial of due process."

Summarizing the evidence in regard to the treatment of the accused Mr. JUSTICE BLACK said:

"Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the drag net methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farm-

ers by State officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance." . . .

"For five days petitioners were subjected to interrogations culminating in Saturday's (May 20th) all night examination. Over a period of five days they steadily refused to confess and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings. Some were practical strangers in the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions, they never knew just when any one would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives—so far as these ignorant petitioners could know—in the balance. The rejection of petitioner Woodward's first 'confession,' given in the early hours of Sunday morning, because it was found wanting, demonstrates the relentless tenacity which 'broke' petitioners' will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol."

In reply to arguments that law enforcement methods such as those under review are necessary to uphold law, it was said:

"The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.

"The Supreme Court of Florida was in error and its judgment is reversed."

Communications Act of 1934—Scope of Judicial Review of Administrative Action

Under the Communications Act of 1934, the jurisdiction of the appellate courts to review administrative action, is limited to a purely judicial review, and does not include a superior revisory function in the field of administrative action.

Where the Commission has ruled erroneously on a question of law that an applicant for a permit to construct a broadcasting station is financially disqualified, the Court of Appeals has jurisdiction to review and correct that ruling, but on remand should not restrict the Commission to hearing on the original record and preclude it from considering the application simultaneously with rival applications subsequently filed.

Federal Communications Comm. v. Pottsville Broad-

casting Co., 84 Adv. Op. 361; — Sup. Ct. Rep. — (No. 265, decided January 29, 1940).

This case presents a question as to the scope of review by the Circuit Court of Appeals of the District of Columbia of an order of the Federal Communications Commission.

The respondent by application sought a permit from the Commission under § 319 of the Communications Act of 1934, Title iii, for the construction of a broadcasting station at Pottsville, Pennsylvania. The Commission denied the application. The ground of denial considered by the Circuit Court of Appeals was that the respondent was financially disqualified. This ruling of the Commission was reversed by the Circuit Court of Appeals on a question of law. That Court remanded the cause to the Commission for reconsideration.

On remand, the Commission set the application down for argument with applications for similar permits by two rivals. The rival applications had been filed subsequently to that of the respondent's. The respondent then obtained a writ of mandamus from the Circuit Court of Appeals which directed the Commission to set aside its order designating the respondent's application "for hearing on a comparative basis" with the other two and directed consideration of the respondent's application on the record originally made and which was reviewed by the Circuit Court of Appeals. On certiorari, this ruling was reversed by the Supreme Court in an opinion by Mr. JUSTICE FRANKFURTER.

The opinion briefly reviews the legislative history of the Act and emphasizes that the Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication, but that its purpose is rather to maintain, through administrative control, a grip on the dynamic aspects of radio transmission.

To effectuate this purpose, as Mr. JUSTICE FRANKFURTER points out, the Act contemplates a method of appellate review different from that ordinarily prevailing where the initial action is judicial rather than administrative. Commenting on the difference between appellate review of administrative action as compared with review of judicial action, he says:

"Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable was a quarter century ago the opinion of eminent spokesmen of the law. Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review, which have

evolved from the history and experience of courts. . . To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulations and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."

Attention is also called to the fact that whereas originally, under §16 of the Radio Act of 1927, the Court of Appeals had statutory authority to exercise administrative functions by virtue of the Act to "alter or revise the decision appealed from and enter such judgment as to it may seem just," by later amendment the Court was restricted to a purely judicial review.

In conclusion, the Court finds that it rested in the discretion of the Commission to determine whether the three applications should be heard together and that the Court of Appeals was without power to write a principle of priority into the statute. In exposition of this conclusion, the opinion states:

"The Commission's responsibility at all times is to measure applications by the standard of 'public convenience, interest, or necessity.' The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of 'public convenience, interest, or necessity.' The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed. Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of administrative actions. Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute. It would mean that for practical purposes the contingencies of judicial review and of litigation, rather than the public interest, would be decisive factors in determining which of several pending applications was to be granted."

Mr. JUSTICE McREYNOLDS concurred in the result. *Fly v. Heitmeyer* (No. 316, decided January 29, 1940) is a companion case to the foregoing. In it a question was involved similar to that presented in the *Pottsville Broadcasting Co.* case. The principal difference between the cases is, that on the remand in No. 316 the Commission proposed not only to reconsider the respondent's application with rival applications, but also to reopen the record for the purpose of taking new evidence as to the comparative ability of the several applicants to satisfy "public convenience, interest, or necessity." The Supreme Court, in a brief opinion by Mr. JUSTICE FRANKFURTER, ruled that it is within the Commission's discretion to reopen the case if, in its judgment, that action is necessary to enable the Commission to fulfill its statutory function.

Mr. JUSTICE McREYNOLDS concurred in the result. The cases were argued by Mr. Solicitor General Jackson for the petitioner, and by Mr. Charles D. Drayton and Mr. Eliot C. Lovett for the respondent.

Labor Law—Review of Findings and Orders of National Labor Relations Board

Employment of sailor is not terminated by completion of voyage. The relation continues unless terminated for cause. There is no "vacancy" in the crew during temporary lay-up at end of journey or in dry dock for repairs justifying employment of other sailors unless misconduct or unfitness authorizes discharge.

Labor Relations Board may order a steamship company to "cease and desist" from attempting to substitute other men for its sailors at the end of voyage or during temporary lay-up for repairs and from refusing "ship passes" to the representative of one labor organization while granting them to another and from attempting to influence its sailors to join one rather than another labor organization. While the Circuit Court of Appeals may review certain orders of the Labor Board on questions of law it may not review findings of fact of the board unless there was no substantial evidence to support them.

National Labor Relations Board, petitioner, v. Waterman Steamship Corporation, respondent. (No. 193, decided Feb. 12, 1940).

In this case the Supreme Court granted a writ of certiorari to review the decision of the Circuit Court of Appeals, Fifth Circuit.

A "cease and desist" order of the Labor Relations Board was taken to the Circuit Court for review on the ground (among others) that there was no substantial evidence to support the findings and order of the board. To determine that question of law that court examined the facts and concluded that there was no substantial evidence to support the findings and order. The Supreme Court also reviewed the facts in order to determine that question and came to the opposite conclusion.

The order of the board is stated in a footnote to the opinion of the Supreme Court as follows:

"In outline, the Board ordered the Waterman Company to cease and desist from issuing ships' passes to the A. F. of L. on a favored basis as compared to the C. I. O.; from discouraging membership in C. I. O. affiliates by discriminating against its members; and from interfering with its employees' rights of self-organization and free collective bargaining. It affirmatively ordered the Company to grant equal passes to the C. I. O. and the A. F. of L., if granted to either; to make whole and offer full reinstatement to those employees found to have suffered discrimination; and to post appropriate notices on the Waterman vessels."

Space is here lacking for a full review of the evidence. It may be sketched as follows:

The American Federation of Labor and the Committee of Industrial Organization through their respective affiliates were in competition for the enrollment of seamen. The respondent Waterman Steamship Corporation was engaged in the carriage of freight in coastwise and foreign commerce and employed many sailors. There was evidence indicating that the steamship company had a preference toward one and an opposition to another of those affiliates, although charges to that effect were denied by the steamship company.

While this competition for enrollment in the respective labor affiliates was on, the steamship company put two of its boats into dry dock for repairs, laid off and paid its sailors, and took the position that it could then deal with the labor situation on a fresh basis.

The board found that this was done in violation of the National Labor Relations Act and that by refusing ships' passes to one of the affiliates and granting them

to the other the employer interfered with the employees' free right to select a union of their own choosing.

Under the law the status of a sailor at the end of a voyage is not a discharge. There is a "continuing tenure or relationship . . . when the temporary lay-ups of their ships ended." This continuing relationship was held by the board to relieve the employer from obligation to fill all vacancies from one of the labor affiliates with which it had a contract obligating the filling of all vacancies with members of an A. F. L. affiliate.

The evidence of discrimination on the part of the employer in favor of one of the labor affiliates and the consequent interference with the right of free choice of labor representation is reviewed in the opinion at great length. At the conclusion MR. JUSTICE BLACK says:

"From all this evidence, there can be no doubt of the substantial support for the Board's finding that the crews, O'Conner and Pelletier all lost their jobs because of C. I. O. affiliation and activities."

The evidence also of discrimination as to ships' passes was likewise reviewed and the opinion declares:

"Enough has been shown to establish the reasons for the Board's decision that if the Company was to permit any opportunity for contact with the men, a fair election required that equal opportunities be given to both the C. I. O. and the A. F. of L. The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly, were matters which Congress entrusted to the Board alone. Interference in those matters constituted error on the part of the court below."

In closing the opinion MR. JUSTICE BLACK said:

"All of this is not to say that much of what has been related was uncontradicted and undenied by evidence offered by the Company and by the testimony of its officers. We have only delineated from this record of more than five hundred pages the basis of our conclusion that all of the Board's findings, far from resting on mere suspicion, are supported by evidence which is substantial. The Court of Appeals' failure to enforce the Board's order resulted from the substitution of its judgment on disputed facts for the Board's judgment,—and power to do that has been denied the courts by Congress. Whether the court would reach the same conclusion as the Board from the conflicting evidence is immaterial and the Court's disagreement with the Board could not warrant the disregard of the statutory division of authority set up by Congress."

The case was reversed and remanded to the Court of Appeals with directions to force the board's order in its entirety.

Argued on January 3, 1940, by Mr. Robert B. Watts for petitioner and by Mr. Gessner T. McCorvey and Mr. C. A. L. Johnstone, Jr., for respondent.

Statutes—Effect of Statute Passed Pending an Appeal from a Judgment—Priority of Employee's Claim for Injury in Receivership Case

If, subsequent to the entry of a judgment and prior to a decision thereon by an appellate court a statute is enacted which changes the governing law, the statute must be given effect by the appellate court, if applicable and valid.

The amendment to the Bankruptcy Act giving priority to claims of employees for personal injury, in railroad receivership and bankruptcy proceedings, is constitutionally valid.

Carpenter v. Wabash Ry. Co., et al., 84 Adv. Op. 403; — Sup. Ct. Rep. — (No. 230, decided January 9, 1940).

This opinion deals with the effect of subsection (n)

of § 77 of the Bankruptcy Act which confers priority in railroad equity receivership cases on claims for personal injuries to employees of the railroad corporation and of personal representatives of deceased employees, as well as certain other claims specified.

The amendment was approved August 11, 1939. The injury in question occurred prior to February, 1931, at which time the petitioner recovered a judgment in a Missouri court for \$15,000 against respondent Company for personal injuries sustained in the course of the petitioner's employment. On appeal, the judgment was reduced to \$10,000 and affirmed.

Later, in December, 1931, the receivership proceedings were instituted and a special master was appointed to take proof of claims. The master allowed the claim in question as an unsecured claim without lien or priority. The master's ruling was affirmed by the District Court and the ruling of that Court was affirmed by the Circuit Court of Appeals.

The petitioner sought certiorari by petition filed July 26, 1939, less than a month prior to the approval of the statutory provision above referred to. Subsequently thereto a supplementary brief in support of the application was filed and the Supreme Court granted certiorari limited to the question of the petitioner's right to intervene in order to assert priority of his claim. After argument, the Supreme Court, in an opinion by MR. CHIEF JUSTICE HUGHES, concluded that the petitioner was entitled to priority under the statute and remanded the cause to the District Court with directions to allow the claim in accordance with the statutory provision.

First considered is the rule as to the effect of a statute on a judgment rendered before the enactment of the statute. The statement of the rule by Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch, 103, 110, is cited, wherein it is stated that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." In application of this rule to the statute here involved to afford priority to the petitioner's claim, the Court says:

"We are of the opinion that the amended statute is applicable to this proceeding. The statute applies to 'equity receiverships of railroad corporations now . . . pending in any court of the United States.' This is such a case. The statute applies to 'claims for personal injuries to employees of a railroad corporation.' This is such a claim. The statute says that a claim of that sort 'shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad.' This is a direct requirement governing the action of the court in this cause."

The Court also passes on the constitutional validity of the amendatory statute and holds that it is supported by the constitutional provision which vests Congress with power over bankruptcies. Dealing with this phase of the case, MR. CHIEF JUSTICE HUGHES says:

"We have no doubt that Congress has constitutional power to impose this requirement. We have held that earnings, while a railroad is in possession of the court and operated by its receivers, 'are not necessarily and exclusively the property of the mortgagees' but are subject to the payment of claims which have superior equities as these may be found to exist. . . Claims having such equities may be accorded priority in payment although they arose prior to the receivership. . . It is manifest that the reasonable classification of claims as entitled to priority because of superior equities may be the subject of determination by Congress in providing for the distribution of assets in bankruptcy proceedings. . . In this view, the provision of subsection (n) of Section 77 of the Bankruptcy Act.

as it stood prior to the amendment of August 11, 1939, was sustained by the Circuit Court of Appeals of the Seventh Circuit in *Wise v. Chicago, R. I. & P. Rwy. Co.* (90 F. (2d) 312) with respect to certain unsecured surety bonds and by the Circuit Court of Appeals of the Eighth Circuit with respect to claims for injuries to railroad employees. . .

"We see no ground for a different conclusion with respect to the power of Congress to enact the amendment in relation to the distribution of assets in the case of an equity receivership. And the fact that the provision as to the latter is included in a section of the bankruptcy statute does not derogate from its controlling authority as an expression of the will of Congress. The Circuit Court of Appeals of the Eighth Circuit has recently held this provision as to equity receiverships to be applicable and valid in relation to claims for personal injuries sustained by employees of this railroad corporation. *American Surety Co. v. Wabash Railway Co.*, 107 F. (2d) 685. We think the conclusion is sound."

The case was argued by Mr. Hyman G. Stein for the petitioner, and by Mr. Arthur A. Gammell for the respondents.

Interstate Commerce—State Gasoline Taxes

An Arkansas statute prohibiting entry into the state of automobiles carrying over 20 gallons of gasoline for use as motor fuel until the state tax has been paid is unconstitutional as an obstruction to interstate commerce when it is applied to a corporation operating interstate busses carrying more gasoline than is required to complete its projected trip through Arkansas insofar as the tax is made applicable to gasoline that will be used elsewhere after the Arkansas trip is completed.

McCarroll v. Dixie Greyhound Lines, Inc. — Adv. Op. —, — Sup. Ct. Rep. —. [No. 138, decided February 12, 1940.]

This opinion involves an appeal by the state Commissioner of Revenue for Arkansas from a judgment of the Circuit Court of Appeals for the 8th Circuit which had directed the district court to grant an injunction against the enforcement of the provisions of an Arkansas law relating to the taxation of gasoline. The statute prohibited entry into Arkansas of any automobile or truck carrying over 20 gallons of gasoline in its tank or in auxiliary tanks, to be used as motor fuel until the state tax of 6½¢ per gallon had been paid. The appellee was a Delaware corporation operating busses from Memphis, Tennessee, across Arkansas to St. Louis, Missouri, over a route covering three miles in Tennessee, 78 miles in Arkansas and 261 miles in Missouri. Each bus consumed about one gallon of gasoline for every 5 miles traveled. 68 gallons were required for the trip from Memphis to St. Louis. Less than one was used in Tennessee, 16 were used in Arkansas, and 51 in Missouri. It was the practice of the company to place in the busses' tanks at Memphis the 68 gallons that would be required for the trip plus ten to meet any emergency. Thus on arrival at the Arkansas line the tank contained approximately 77 gallons of gasoline of which only 16 would be used in the state. The state revenue office had sought to collect the tax on the full 77 gallons of gasoline as a condition precedent to the entry of the busses into Arkansas.

On this state of the facts the court's opinion by Mr. JUSTICE McREYNOLDS approves the action of the Circuit Court of Appeals in directing the district court to enjoin the enforcement of the tax against the bus company with respect to all gasoline in the fuel tanks of its interstate busses which is being carried through Arkansas for use in other states. It states that while

generally a state may not directly burden interstate commerce by taxation, she may require all who use her roads to make reasonable compensation therefor; and points out that if, considering all the circumstances, the imposition here involved can reasonably be regarded as proper compensation for the use of the roads, it is permissible. It then concludes that the facts here disclosed are incompatible with that view. In discussing those facts it says:

"A fair charge could have no reasonable relation to such gasoline. That could not be even roughly computed by considering only the contents of the tank. Moreover, we find no purpose to exact fair compensation only from all who make use of the highways. Twenty gallons of gasoline ordinarily will propel a bus across the State and if only that much is in the tank at the border no charge whatever is made. Evidently large use without compensation is permissible and easy to obtain."

The challenged judgment was, therefore, affirmed.

MR. JUSTICE STONE delivered a concurring opinion in which the CHIEF JUSTICE, MR. JUSTICE ROBERTS, and MR. JUSTICE REED joined. This opinion states that while they are in accord with the principal opinion, the concurring justices think a word should be said of the contention that the tax in its practicable operation may be taken as a fair measure of the bus company's use of the highways. Their opinion points out that it must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made.

It had been argued that as applied to reserve gasoline in each of the companies' vehicles, the tax either is, or with a reduction of the reserves would be, substantially equivalent to a tax which the state could lay, but has not, on the gasoline consumed within the state. Discussing this contention, the concurring opinion says:

"That could be true only in case the taxed gasoline, said to be reserved for the extrastate journey, were by chance or design of substantially the same amount as that consumed intrastate.

"That the relationship between tax and highway use does not in fact exist as the business is now conducted, is demonstrated by appellant's showing that on all of appellee's routes, taken together, the taxed gasoline which is reserved for extrastate use is substantially more than that consumed on those routes within the state. In three the taxed reserve in excess of the twenty gallons exemption is substantially the same as the amount of the intrastate consumption. But on the fourth route the taxed reserve on busses moving in one direction is more than four times that consumed within the state. In the other it is approximately the same. With the three scheduled trips daily each way on the Memphis-St. Louis route, the excess of the gasoline taxed over that consumed in the state is more than 150 gallons per day. In no case does it appear that the amount of taxed gasoline has any relation to the size or weight of vehicles.

"It cannot be said that such a tax whose equivalence to a fair charge for the use of the highways, when not fortuitous, is attained only by appellee's abandonment of some of the commerce which is taxed, has any such fair relationship to the use of the highways by appellee as would serve to relieve the state from the constitutional prohibition against the taxation of property moving in interstate commerce. A tax so variable in its revenue production when compared with the taxpayer's intrastate movement cannot be thought to be 'levied only as compensation for the use of the highways'."

The opinion also points out that it is no answer to the challenge to say that by altering the amount of gasoline brought into the state for extrastate consumption, the company could so moderate the tax that it

would bear a fair relation to the use of the highways within the state. The opinion points out that there are ways enough in which the state can take its lawful toll without any suppression of the commerce which it taxes and that an unlawful exaction cannot be justified by insisting that it would be lawful if the taxpayer were to relinquish some of the commerce which the constitution protects from state interference.

MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS filed a separate dissenting opinion. The dissent emphasizes the view that every enactment of a legislature carries a presumption of constitutionality until it is shown beyond all reasonable doubt to be invalid and states the belief that the Arkansas tax does not in their opinion beyond reasonable doubt violate the constitutional provision that "Congress shall have power to . . . regulate commerce . . . among the states." It reviews the problems involved in the construction and maintenance of modern highways and observes that the Arkansas tax hits the big heavy busses and trucks which entail most serious wear and tear upon roads. It observes that the disagreement of the dissenting Justices does not arise from a belief that Federal action is unnecessary to bring about appropriate uniformity in regulations of interstate commerce, but from the principle that it is not for the courts to approve or disapprove what the states have done in an effort to solve the problem. The dissent then concludes that even under the principle of the majority opinion—that Arkansas may not measure her tax by gasoline carried in the companies' tanks for use in other states—the injunction should not be granted. Discussing this branch of the case, the opinion says:

"Arkansas admittedly has power to tax appellee upon gasoline used within her borders, and need not, of course, extend to appellee any exemption for a reserve. The record discloses that appellee's busses travel 1188.8 miles each day over Arkansas highways. The trial judge found, and there is evidence to support the finding, that these busses use about one gallon of gasoline for every five miles traveled. Thus, appellee uses about 237.76 gallons of gasoline a day in Arkansas, upon which the tax of 6.5 cents per gallon used would amount to \$15.45 a day.

"Appellee's busses travel four different routes, two from Memphis through Arkansas to Missouri, and two from Memphis to cities in Arkansas. On the trips to Missouri the tax now exacted by Arkansas is greater than would be a tax on the gasoline actually used in Arkansas. But on the trips from Memphis into Arkansas and back, the tax exacted, because of the 20-gallon exemption, is less than would be a tax on the gasoline used in Arkansas.

"As appellant points out in his brief, when all the routes are taken together, the daily tax which Arkansas would collect if appellee carried only enough gasoline to complete each trip would only amount to \$13.00—actually \$2.45 less than a tax on gasoline consumed in Arkansas.

"This amount—\$2.45—equals the present tax on 37 gallons of gasoline. Appellee's busses enter Arkansas 13 times each day. It follows that appellee may carry a reserve of almost three gallons on each trip and still pay no more than the tax which, as the majority assumes, Arkansas could constitutionally impose on the gasoline actually consumed on her own roads. There is nothing in the record to show that a greater reserve is necessary. An interstate carrier has no absolute right to fix the size and character of its equipment used in interstate commerce, in total disregard of the necessities of the enterprise and the requirements of States through which the carrier operates. Exactions by such States may well be designed to operate upon the quantity of gasoline reserves for considerations analogous to those which have called into being state regulations of the size, weight and number of the vehicles themselves. And a state tax which may induce a reduction in the amount of reserve previously

carried is no more to be condemned on that sole ground alone than is a state law actually prohibiting vehicles above a certain size or weight."

In conclusion the dissenting opinion observes that

"Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit and miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the states."

The case was argued on December 14, 1939, by Mr. Frank Pace, Jr., and Mr. Amos M. Matthews for appellant and by Mr. A. L. Heiskell for appellee.

Taxation—State Tax on Bank Deposits—Equality of Tax—Privileges and Immunities

A Kentucky statute lays a tax on bank deposits of its citizens in banks outside the state five times that on deposits of its citizens in banking institutions in the state. The tax is sustained against challenges based on the due process, equal protection and privileges and immunities clauses of the Fourteenth Amendment.

Madden, Jr. v. Kentucky, 84 Adv. Op. 406; — Sup. Ct. Rep. — (No. 92, decided January 29, 1940).

On this appeal from the Court of Appeals of Kentucky, the question presented was whether the Kentucky statute as applied violated the due process, equal protection, and privileges and immunities clauses of the Fourteenth Amendment. The statute imposes on citizens an annual ad valorem tax on their deposits in banks outside of the State at the rate of 50c per \$100. At the same time it lays a similar ad valorem tax on deposits in banks located within the State of 10c per \$100. The Court of Appeals of Kentucky construed the 1/10 of 1% tax as applicable only to deposits in local financial institutions organized under the State laws or national banking laws and sustained it. On appeal, the Supreme Court affirmed by a divided bench, with Mr. JUSTICE REED delivering the prevailing opinion.

In dealing with the case, he first discusses the validity of the statutory classification. In view of the rule, as stated in the opinion, that the burden is on one attacking the classification to negative every conceivable basis which might support it, some of the reasons in support of the classification were mentioned. As to the justifiable basis for the classification, the opinion states:

"Paying proper regard to the scope of a legislature's powers in these matters, the insubstantiality of petitioner's claim that he has been denied equal protection or due process of law by the classification is at once apparent. When these statutes were adopted in 1917 during a general revision of Kentucky's tax laws, the chief problem facing the legislature was the formulation of an enforceable system of intangible taxation. By placing the duty of collection on local banks, the tax on local deposits was made almost self-enforcing. The tax on deposits outside the state, however, still resembled that on investments in *Watson v. State Comptroller*, the collection of which was said to depend 'either upon [the taxpayer's] will or upon the vigilance and discretion of the local assessors.' Here as in the *Watson* case the classification may have been 'founded in

"the purposes and policy of taxation." The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection."

Attention is then turned to the appellant's argument that the privileges and immunities clause forbids enforcement of the exaction. This argument was based upon the assumption that a citizen of a state has a right pertaining to his national citizenship to carry on business beyond the state of his residence. In dealing with this contention Mr. JUSTICE REED recalls that the limitations on the privileges and immunities clause were recently discussed in *Hague v. C. I. O.*, 307 U. S. 496, and that there is no occasion again to attempt an exposition of the Court's views on the subject. He observes that the Court has consistently refused to list completely the rights covered by that clause, but adds that it is clear that the right to carry out an incident to a trade or calling such as the deposit of money in banks is not a privilege of national citizenship.

In conclusion, *Colgate v. Harvey*, 296 U. S. 404, relied on by the appellant, was found to be inconsistent with the reasoning adopted by the Court and was, therefore, overruled.

Mr. CHIEF JUSTICE HUGHES concurred in the result upon the ground that the legislative classification rests upon a reasonable basis.

Mr. JUSTICE ROBERTS voted for reversal of the judgment on the authority of *Colgate v. Harvey*, *supra*, and stated that he adhered to the views there expressed.

Mr. JUSTICE McREYNOLDS joined in the opinion of Mr. JUSTICE ROBERTS.

The case was argued by Mr. Leo T. Wolford for the appellant, and by Mr. Samuel M. Rosenstein for the appellee.

Taxation—Estate Tax—Status of Gifts Inter Vivos

In determining whether transfers of property *inter vivos* are within the provisions of §302(c) of the Revenue Act of 1926, the controlling test is to be found not in the art of conveyancing or the law of contingent and vested remainders, but in whether the death of the grantor was the indispensable and intended event which brings a larger estate into being for the grantee and effects its transmission from the dead to the living.

Helvering v. Hallock, 84 Adv. Op. 382; — Sup. Ct. Rep. — (Nos. 110, 111, 112, 183 and 399, decided January 29, 1940).

The several cases disposed of by this opinion all involve the same question, namely, whether transfers of property *inter vivos* made in trust are within the provisions of §302(c) of the Revenue Act of 1926. The conveyances in trust differ somewhat in terminology.

In *Helvering v. Hallock*, involved in Nos. 110, 111 and 112, the decedent, in 1919, created a trust giving the income to his wife for life with a further provision that if the wife died the trust should terminate and the income and principal should be paid over to the grantor, unless the latter was dead in which event payment was to be made to named persons. The life beneficiary survived the grantor. The Circuit Court of Appeals held that the "whole interest" of the decedent passed under the trust, subject only to a "condition subsequent," which left the settlor nothing "except a mere possibility of reverter."

In No. 183, the decedent conveyed property in trust by an ante-nuptial agreement, the income to be paid the prospective wife for life. Provision was made further that in the event of the wife's death during the settlor's

lifetime, all principal and accumulated income was to be turned over to the settlor free of the trust. But if the wife survived the settlor, the principal and accumulated income was to be paid to her free of the trust. The wife survived the husband. The Circuit Court of Appeals ruled that the trust corpus should be excluded in determining the husband's gross estate.

In No. 399, the testator set up a trust for the payment of the income to his wife for life and on her death to the settlor himself, if he should survive. It was provided further that on the death of the survivor of the husband or wife, the principal was to be paid over to the executors or administrators of the husband. The wife survived the husband. The Board of Tax Appeals allowed the inclusion in the testator's gross estate of the value of a "vested reversionary interest" which the Board held the grantor had reserved to himself. The Circuit Court of Appeals affirmed this ruling and its judgment was affirmed by the Supreme Court. The decisions in the other cases were reversed.

The problem presented, as viewed by the majority, is whether the Court should import into the administration of the Revenue Act the refinements of conveyancing and property law, or should consider broadly the ultimate economic effect of the grantor's action, irrespective of the conveyancer's device used to accomplish the intended purpose.

In solution of the problem the majority of the Supreme Court, in an opinion by Mr. JUSTICE FRANKFURTER adopts the latter view, and repudiates the distinctions which *Helvering v. St. Louis Trust Co.*, 296 U. S. 39, and *Becker v. St. Louis Trust Co.*, 296 U. S. 48, had drawn after the decision in *Klein v. United States*, 283 U. S. 231. In the two *St. Louis Trust* cases four of the Justices had been unable to find any unjustifiable differences between those cases and the *Klein* case. The opinion by Mr. JUSTICE FRANKFURTER concludes that no coherent body of law can be deduced from the three decisions and that the sound principle is that urged in the dissent in the *St. Louis Trust Co.* cases.

After setting forth the relevant provisions of the trust deeds, the opinion states the reasons for adopting the principle urged in the dissent in the *St. Louis Trust* cases, as follows:

"The terms of these grants differ in detail from one another as all three differ from the formulas of conveyance used in the *Klein* and *St. Louis Trust* cases. It therefore becomes important to inquire whether the technical forms in which interests contingent upon death are cast should control our decision. If so, it becomes necessary to determine whether the differing terms of conveyance now in issue approximate more closely those used in the *Klein* case and are therefore governed by it, or have a greater verbal resemblance to those that saved the tax in the *St. Louis Trust* cases. Such an essay in linguistic refinement would still further embarrass existing intricacies. It might demonstrate verbal ingenuity, but it could hardly strengthen the rational foundations of law. The law of contingent and vested remainders is full of casuistries. There are great diversities among the several states as to the conveyancing significance of like grants; sometimes in the same state there are conflicting lines of decision, one series ignoring the other. Attempts by the Board of Tax Appeals and the Circuit Courts of Appeal to administer §302 (c) by reference to these distinctions abundantly illustrate the inevitable confusion. One of the cases at bar, No. 399, reveals vividly the snares which inevitably await an attempt to base estate tax law on the 'niceties of the art of conveyancing.' In connection with the ascertainment of its own death duties, the Supreme Court of Errors of Connecticut defined the nature of the interest which the de-

cedent in that case retained after his *inter vivos* transfer. . . . And yet the nature of that interest under Connecticut law and the scope of the Connecticut Court's adjudication of that interest were made the subject of lively controversy before us. The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.

"Our real problem, therefore, is to determine whether we are to adhere to a harmonizing principle in the construction of §302 (c), or whether we are to multiply gossamer distinctions between the present cases and the three earlier ones. Freed from the distinctions introduced by the *St. Louis Trust* cases, the *Klein* case furnishes such a harmonizing principle. Does, then, the doctrine of *stare decisis* compel us to accept the distinctions made in the *St. Louis Trust* cases as starting points for still finer distinctions spun out of the tenuousities of surviving feudal law? We think not. We think the *Klein* case rejected the presupposition of such distinctions for the fiscal judgments which §302(c) demands.

"We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

Mr. CHIEF JUSTICE HUGHES concurred on the ground that the cases are controlled by the *Klein* case.

Mr. JUSTICE ROBERTS delivered a dissent in which Mr. JUSTICE REYNOLDS concurred. In his opinion he states that there is a distinction in fact between the transaction in the *Klein* case and those involved in the *St. Louis Trust* cases. In addition, Mr. Justice Roberts adds that the rule of interpretation adopted in the *St. Louis Trust* cases should be followed here for two reasons, as follows:

"First, that rule was indicated by decisions of this court as the one applicable in the circumstances here disclosed, as early as 1927; was progressively developed and applied by the Board of Tax Appeals, the lower federal courts, and this court, up to the decision of *McCormick v. Burnet*, 283 U. S. 784, in 1931; and has since been followed by those tribunals in not less than fifty cases. It ought not to be set aside after such a history. Secondly. The rule was not contrary to any treasury regulation; was, indeed, in accord with such regulations as there were on the subject; was subsequently embodied in a specific regulation, and, with this background, Congress has three times reenacted the law without amending §302 (c) in respect of the matter here in issue. The settled doctrine, that reenactment of a statute so construed, without alteration, renders such construction a part of the statute itself, should not be ignored but observed."

Considerations in support of these propositions are then elaborated in the opinion.

The case was argued by Mr. Arnold Raum for the petitioner and by Mr. Walker K. Nye and Mr. Ashley N. Van Duzer for respondents in No. 110 and 111 and submitted by Mr. W. H. Annat for S. H. Squire.

Taxation—Sales Tax Imposed by City of New York—Validity as Applied to Interstate Sales

The New York City 2% sales tax does not violate the commerce clause of the Federal Constitution in its application to sales made by a Pennsylvania corporation for the sale of coal mined in Pennsylvania and transported to and delivered in New York City under contracts made prior to the delivery, although the tax is measured at the rate of 2% upon the amount of receipts from the sales. The tax is found to be nondiscriminatory and a charge which the state may constitutionally lay on the purchasers of goods for consumption, consistently with the commerce clause.

McGoldrick v. Berwind-White Coal Mining Co., 84 Adv. Op. 343; — Sup. Ct. Rep. — (No. 475, decided January 29, 1940).

This case presented a question whether the 2% sales tax imposed by the City of New York is valid under the commerce clause of the Constitution as applied to coal mined in Pennsylvania and sold by a corporation of that State to consumers in New York City. The coal is delivered under contracts of sale made in advance of delivery.

The tax was levied by the City of New York under state legislation which authorized the city to impose any tax which the legislature itself could impose and directed that the tax should have application only within the territorial limits of the city and should not be made on any transaction originating or consummated outside of the territorial limits of the city notwithstanding that some act be necessarily performed within the city limits with respect to such transaction. It required the revenues from the tax to be used exclusively for unemployment relief.

The 2% tax is imposed on the amount of receipts from purchases for consumption of tangible personal property (with certain exceptions) and on utility services and restaurant meals. "Sale" is defined as "any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor." The tax law requires the tax to be paid by the purchaser to the vendor for the account of the City. The vendor is authorized to collect the tax and is required to charge it to the purchaser separately from the sale price. The vendor is also made liable as an insurer for payment to the City. In the event of non-payment to the seller, the buyer is required to make a tax return within fifteen days after his purchase and to pay the tax. The ultimate burden of the tax is thus laid upon the buyer, for consumption, and is measured by the sales price.

The New York Court of Appeals ruled that the tax was invalid solely because it infringes the commerce clause of the Constitution. It left open the question whether the tax was applicable under the terms of the state legislation. On certiorari, the judgment was reversed by the Supreme Court by a divided bench. Mr. JUSTICE STONE delivered the prevailing opinion.

The majority opinion points out that in interpreting the commerce clause the courts are called upon to reconcile competing constitutional demands arising from the power of the states to lay taxes for the support of state government and the power of the union to regulate interstate commerce. It recognizes that not only taxes which discriminate against interstate commerce are invalid but also those which may readily be made instruments for impeding or destroying such commerce. Finding that the present tax does not fall within the classes so condemned, and emphasizing that the tax is not discriminatory but is an equal burden

on interstate and intrastate commerce, Mr. JUSTICE STONE says:

"Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce.

"The present tax as applied to respondent is without the possibility of such consequences. Equality is its theme. . . It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event, regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce sustained in *Monomotor Oil Co. v. Johnson*, 292 U. S. 86; *Henneford v. Silas Mason Co.* [300 U. S. 577]; *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62; *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in *Gregg Dyeing Co. v. Query*, 286 U. S. 472; *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249; *Edelman v. Boeing Air Transport Co.*, 289 U. S. 249, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. . .

"If, as guides to decision we look to the purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action the commerce clause forbids."

The opinion refers to a distinction urged by the respondent between a tax made on sales made without previous contract, after the property has crossed the state boundary, and sales, the contracts for which when made contemplate interstate transportation to the taxing state. The respondent argued that sales in the latter class are protected from taxation by the commerce clause. This distinction the Court repudiates as being without adequate support in either reason or limitation on the city.

In conclusion, the Court observes that on the remand of the case for further proceedings, the state courts will be free to decide the question of state law whether the tax was wrongly applied in view of the statutory limitation on the city.

Mr. CHIEF JUSTICE HUGHES delivered a dissenting opinion in which Mr. JUSTICE McREYNOLDS and Mr. JUSTICE ROBERTS concurred.

The dissenting opinion states that the case involves interstate commerce in its most obvious form and while it must be recognized that the problem of maintaining the proper balance between state and national power has been a most difficult one, nevertheless, there

appears to be no good reason for sweeping away the protection of interstate commerce where the state lays a direct tax upon that commerce. The analysis in the dissenting opinion is to the effect that the present tax is a direct imposition on interstate commerce. The constitutional vice of the tax in question, in the view held by the dissenting Justices, is explained in the following portion of the dissenting opinion:

"In relation to the present transaction, it would hardly be contended that New York could tax the transportation of the coal from Pennsylvania to New York or a contract for that transportation. But the movement of the coal from the one State to the other was definitely required by the contracts of sale and these sales must be regarded as an essential part of the commercial intercourse contemplated by the commerce clause. . . The tax on the gross receipts of the seller from these sales was manifestly an imposition upon the sales themselves. Whether the tax be small or large, it is plainly to the extent of it a burden upon interstate commerce; and as it is imposed immediately upon the gross receipts from that commerce, it is a direct burden. And, as we have often said, where what is taxed is subject to the jurisdiction of the State, the size of the tax lies within the discretion of the State, and not of this Court. . .

"How then can the laying of such a burden upon interstate commerce be justified? It is urged that there is a taxable event within the State. That event is said to be the delivery of the coal. But how can that event be deemed to be taxable by the State? The delivery is but the necessary performance of the contract of sale. Like the shipment from the mines, it is an integral part of the interstate transaction. It is said that title to the coal passes to the purchaser on delivery. But the place where the title passes has not been regarded as the test of the interstate character of a sale. We have frequently decided that where a commodity is mined or manufactured in one State and in pursuance of contracts of sale is delivered for transportation to purchasers in another State, the mere fact that the sale is f. o. b. cars in the seller's State and the purchaser pays the freight does not make the sale other than interstate. And when, as here, the buyer in an interstate sale takes delivery in his own State, that delivery in completion of the sale is as properly immune from State taxation as is the transportation to the purchaser's dock or vessel. Moreover, even if it were possible to sustain a State tax by reason of such delivery within the State, there would still be no ground for sustaining a tax upon the whole of the interstate transaction of which the delivery is only a part, as in the case of a tax upon the entire gross receipts."

The dissenting opinion denies that the tax here is, in substance, the same as a use tax. It also rejects the theory that the tax can be sustained because it is non-discriminatory. The insufficiency of the non-discriminatory character of the tax to save it is urged in the following portion of the dissent:

"The ground most strongly asserted for sustaining the tax in the present case is that it is non-discriminatory. Undoubtedly a state tax may be bad because it is so laid as to involve a hostile discrimination against interstate commerce. But does it follow that a State may lay a direct tax upon interstate commerce because it is free to tax its own commerce in a similar way? Thus, a State may tax intrastate transportation, but it may not tax interstate transportation. The State may tax intrastate sales, but can the State tax interstate sales in order to promote its local business? It would seem to be extraordinary if a State could escape the restrictions against direct impositions upon interstate commerce by first laying exactions upon its own trade and then insisting that in order to make its local policy completely effective it must be allowed to lay similar exactions upon interstate trade. That would apparently afford a simple method for extending state power into what has hitherto been regarded as a forbidden field.

Moreover, it may or may not be in the interest of the State to promote domestic trade in a given commodity. The State may seek by its taxing scheme to restrict such trade and the mere equivalency of a tax upon domestic business would not prevent the injurious effect upon interstate transactions. . . .

"So, while recognizing that a tax discriminating against interstate commerce is necessarily invalid, it has long been held by this Court in the interest of the constitutional freedom of that commerce that a direct tax upon it is not saved because the same or a similar tax is laid also upon intrastate commerce."

Nos. 45 and 474 are companion cases to the foregoing No. 475.

In No. 45, Felt & Tarrant Manufacturing Company, a corporation of Illinois, wherein its plant is located, solicits orders through agents in New York City for the sale of comptometers. The orders are sent to Illinois for approval and, if accepted, are filled and the machines invoiced to the purchaser and shipped to the New York office of the respondent's sales agent for inspection. They are then delivered to the purchaser. Remittances are made direct to Illinois.

In No. 474, respondent, DuGrenier, Inc., a corporation of Massachusetts, wherein is located its plant, is engaged in making and selling automatic vending machines. They are sold throughout the nation by an exclusive sales agent, Stewart & McGuire, Inc. Sales of machines in New York City are solicited by the agent on order and the order is sent by the agent to the Massachusetts office. If accepted, the order is filled by shipment direct to New York City to the purchaser who pays the freight.

In both of these cases, in a brief opinion by Mr. JUSTICE STONE, the New York City sales tax was sustained in its application to the machines sold in the manner described, on the authority of the ruling in *McGoldrick v. Berwind-White Coal Mining Co.*, No. 475.

The CHIEF JUSTICE, Mr. JUSTICE McREYNOLDS and Mr. JUSTICE ROBERTS dissented on the grounds set forth in the dissent in No. 475.

The cases were argued by Mr. William C. Chanler for the petitioner, and by Mr. John W. Davis for the respondent.

Summaries

Action on Postmaster's Bond—Necessity of Government's Consent to Action by Private Person

United States, use Midland Loan Finance Company, v. National Surety Corporation, et al. (No. 236, Op. filed Feb. 5, 1940.)

Mr. JUSTICE REED defined the subject matter of the case as follows:

"The question presented is whether petitioner, a private user of the mails, may without the consent of any officer of the United States bring suit on the bond of an acting postmaster for consequential damages resulting from misdelivery of mail."

The Minnesota District Court dismissed the suit, the Eighth Circuit Court of Appeals affirmed the judgment, certiorari was granted because of an alleged conflict of decisions, and because an important question in the administration of postal laws was involved. The complaint alleged negligence by postal authorities whereby a conspiracy to defraud was made effective, to the damage of the plaintiff. The action was brought in the name of the United States for the use of the in-

jured party, without the consent of any officer of the United States.

Held, that private individuals could not bring suit on official bonds unless consent was granted by competent governmental authority or was deducible from the act, its purposes and its legislative history.

On an analysis of the act, a review of its history, and of the pertinent decisions no proof was found of that intent and the judgments were affirmed.

Argued by Benedict Deinard for the petitioner, George T. Havel, Pierce Butler, Jr., and M. J. Doherty for various respondents, and Robert H. Jackson for the United States as *amicus Curiae*.

National Bank's Liability to Receiver for Unlawful Purchase of Stock—Estoppel

Deitrick v. Greaney, — Adv. Op. —, — Sup. Ct. Rep. —. [No. 246, decided February 12, 1940.]

Certiorari was granted to determine whether a receiver of a National Bank may compel payment of a promissory note knowingly given to the bank by one of its directors as a substitute, among its assets, for shares of its own stock illegally purchased and retained by the bank but with the understanding that it was to retain its interest in the stock and that the note was not to be paid.

The Court's opinion by Mr. JUSTICE STONE reviews the provisions of the National Banking Act which prohibits the purchase by a bank of its own stock, and points out that the purpose of the prohibition is to prevent the impairment of capital resources and consequent injury to creditors in case of insolvency. It then observes that if the director were free to set up the unlawful agreement as a defense and cast the loss from the unlawful stock purchase on the creditors of the bank in receivership, he would be able to defeat the purpose of the statute by taking an advantage of an agreement which it condemns as unlawful. It states that although the strict doctrine of estoppel might not be applicable in this case because it does not appear that the bank was deceived by the concealment and misrepresentation or because injury to creditors was not shown to have resulted from them, yet the directors' act is itself a violation of the statute which, read in the light of its purposes and policy, precludes resort to the very acts which it condemns, as a means of thwarting those purposes by visiting on the receiver and creditors whom he represents the burden of the bank's unlawful purchases.

The opinion also points out that the cases of *Rankin v. City National Bank*, 208 U. S. 541, and *Deitrick v. Standard Surety & Casualty Co.*, 303 U. S. 471, are distinguishable on the ground that in them there was no suggestion of a purpose attributed to the company to mislead creditors or others.

It had been urged that under the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, local law should be applied. The opinion concludes by pointing out that the judicial determination of the legal consequences of acts condemned by the National Banking Act involves decision of a Federal not a state question and therefore local law need not be examined.

Mr. JUSTICE ROBERTS dissented in an opinion in which Mr. JUSTICE McREYNOLDS joined. The dissent is predicated upon the premise that the case of *Deitrick v. Standard Surety & Casualty Co.*, *supra*, is controlling and requires that the promisor should be held liable to the receiver.

Mr. JUSTICE MURPHY did not participate.

The case was argued on January 10, 1940, by Mr.

George P. Barse for petitioner and by Mr. David Stoneman for respondent.

Due Process—Interstate Commerce—Federal Question—Telephone Rates

Bell Telephone Co. of Pa. v. Pa. Public Utility Commission, 84 Adv. Op. 412, — Sup. Ct. Rep. —. [No. 252, decided January 29, 1940.]

Appeal from the Superior Court of Pennsylvania which had sustained an order of the State utility commission requiring the state telephone company to revise its long distance intrastate toll rates to conform with rates of the American Telephone and Telegraph Company for interstate services.

The Supreme Court dismissed the appeal for want of a substantial Federal question. The per curiam opinion rejects the contention that the company was denied due process under the 14th Amendment because the order was wholly unsupported by the evidence. As to this, it points out that the state court had determined that there was evidence to justify the finding of the commission of unreasonable discrimination in intrastate business. The contention that the order is a denial of due process because the rates are unreasonable is also rejected on the ground that since no claim of confiscation is made, the state authority is competent to establish intrastate rates and in so doing to decide what constitutes unreasonable discrimination with respect to intrastate traffic. The third contention, that the order imposes a burden on interstate commerce, is also rejected because the order related exclusively to intrastate traffic.

The case was argued on January 10, 1940, by Mr. Benjamin O. Frick for the appellant.

Eminent Domain—Liability of Government Contractor for Taking

Yearsley v. Ross Construction Co. 84 Adv. Op. 396, — Sup. Ct. Rep. —. [No. 156, decided January 29, 1940.]

Certiorari was granted here to determine the question of a contractor's liability for erosion of petitioner's land produced by equipment used in building dikes in the Missouri river under contract with the United States for the improvement of navigation in that river pursuant to the Act of Congress of January 21, 1929.

The Court's opinion by Mr. CHIEF JUSTICE HUGHES concludes that if authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will. The opinion finds that it is unnecessary for the court to pass upon the question whether the building of the dikes and the erosion of the land constituted a taking of property for which compensation must be made under the 5th Amendment, because if it does, the Government has impliedly promised to pay compensation and has offered a remedy for its recovery by a suit in the court of claims and there is no ground for holding liable the agent of the United States acting under its validly conferred authority.

The case was argued on January 3rd and 4th, 1940, by Mr. Robert Van Pelt for petitioners and by Mr. Clay C. Rogers for respondent.

Federal Instrumentalities—Immunity from Garnishment Proceedings

Federal Housing Administration, Region No. 4 v. Burr, — Adv. Op. —, — Sup. Ct. Rep. —. [No. 354, decided February 12, 1940.]

Certiorari to the Michigan Supreme Court to review its holding that the Federal Housing Administration is

subject to garnishment proceedings instituted under Michigan law for moneys due to an employee.

The Court's opinion by Mr. JUSTICE DOUGLAS holds that the consent "to sue and be sued" given by Congress in Title 1, § 1 of the National Housing Act, embraces all civil process incident to the commencement or continuance of legal proceedings and includes garnishment proceedings of the type here involved. The opinion finds that those provisions of the act which give the administrator authority to appoint employees, etc., are a part of the act for the carrying out of which suit against the administrator to recover compensation is permitted, and garnishment does not, therefore, enlarge the administrators' liability under the act. The opinion also examines the contention that to permit garnishment proceedings will impose heavy burdens on government instrumentalities and impede the performance of its Federal functions. As to this, the opinion finds that considerations of convenience are for Congress to consider in determining whether it wishes to restrict the "sue and be sued" clause of the act.

It has also been urged that execution should not be allowed under the judgment. The opinion finds that so far as the federal statute is concerned execution is not barred, for it is part of the civil process embraced in the "sue and be sued" clause. However, the opinion points out that this does not mean that any funds or property of the United States can be held responsible for the judgment, and that Congress has specifically directed that claims against the authority are to "be paid out of funds made available by the act" which may as a practical matter deprive the execution of utility, since funds of the administration are deposited with the Treasurer of the United States.

MR. JUSTICE MURPHY did not participate.

The case was argued on January 31st and February 1st, 1940, by Mr. Sidney J. Kaplan for petitioner and by Mr. Gus O. Nations for respondent.

Federal Jurisdiction—Operation of State Safety Regulations in Federal Area

James Stewart & Co. v. Sadrakula, 84 Adv. Op. 371, — Sup. Ct. Rep. —. [No. 251, decided January 29, 1940.]

Appeal from a decision of the New York Court of Appeals involving the question whether the New York statute imposing standards for the protection of employees on building construction or demolition work are applicable to impose upon a general contractor engaged in the construction of a post office on land in New York city acquired by the Federal government a liability for the death of an employee killed because of violation of that law.

The Court's opinion by Mr. JUSTICE REED holds that Article 1, §8, cl. 17 of the Constitution which grants Congress power to exercise exclusive legislation over all places purchased by the consent of the legislature of the state in which the land is located for the erection of government buildings, does not require that when the jurisdiction is acquired from a state by the United States, every vestige of the laws of the former sovereignty must vanish, but it permits the continuance until abrogated by Congress of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred and which are not rendered inappropriate or do not interfere with the carrying out of the national purpose.

The opinion concludes that the provisions of the New York labor law do not interfere with the Federal government and are therefore effective in the Federal area until Congress provides otherwise.

The case was argued on January 12, 1940, by Mr. Clarence E. Mellen for appellant and by Mr. Leo Fixler for appellee.

Federal Estate Tax—"General Power of Appointment" Defined

Morgan v. Commissioner of Internal Revenue, 84 Adv. Op. 369, — Sup. Ct. Rep. — [No. 210, decided January 29, 1940.]

Certiorari was granted to decide to what extent and in what sense the law of decedent's domicile governs in determining whether a power of appointment exercised by him is a general power within the meaning of [the applied federal statute,] defining the value of the gross estate to include property passing under a "general power of appointment exercised by the decedent."

Here, under the trust, property in the trustee's hands was given at the beneficiaries' death to appointees named in his will with gifts over in case he failed to appoint, and the trustees were given power to withhold any part of the property going to any beneficiary if they believed it would be dissipated or improvidently handled, and to dispose of the part withheld as the trust directed. It was urged that the applicable law of Wisconsin regards a power of the type involved as special. The Court's opinion by MR. JUSTICE ROBERTS holds that it is unnecessary to determine whether this interpretation of the state statutes and decisions is correct since the Federal revenue acts designate what interests or rights created by state law shall be taxed and when it is found in a given case that an interest or right was the object intended to be taxed, Federal law must prevail no matter what name is given to the interest or right by state law. The opinion then concludes that by several times reenacting the language of the statute, Congress adopted applicable Treasury regulations which provided that a power is within the purview of the statute if the donee may appoint to any person, and that the power involved in this case was a general power under this construction.

The case was argued on January 4th and 5th, 1940, by Mr. Brode B. Davis for petitioner and by Mr. Richard H. Demuth for respondent.

Federal Income Taxation—Taxable Income—Alimony Trusts

Helvering v. Fitch, 84 Adv. Op. 399, — Sup. Ct. Rep. — [No. 243, decided January 29, 1940.]

Certiorari was granted in this case to determine whether as held by the Circuit Court, 8th Circuit, amounts paid under an alimony trust created by a taxpayer and confirmed as part of an Iowa divorce proceeding, by which certain premises were transferred to a trustee to hold title, collect rents, and pay from it a stated sum to the wife during her life, and the balance to the taxpayer for his life, should be included as taxable income for the year 1933. The trust was irrevocable, was to continue at least fifteen years and upon the death of both the taxpayer and his wife and the principal was to be paid to his children. Upon the death of either the taxpayer or wife, the decedent's share of the income was to be paid to their children. There was no agreement by the taxpayer to make up any deficiencies in the monthly payment to the divorced wife.

The Court's opinion by MR. JUSTICE DOUGLAS concludes that the rule of *Douglas v. Willcuts*, 296 U. S. 1, that "amounts paid to a divorced wife under a decree of alimony are not regarded as income of the wife but as paid in discharge of the general obligation to support

... made specific by the decree," is applicable. It rejects arguments that, the instant case requires a different rule, because the settlement effected an absolute discharge of any duty or obligation on the taxpayer's part to support the wife; in support of this argument, it had been urged that under the Iowa statute and decisions, the divorce court was without power to modify the decree confirming the settlement. The opinion examines those decisions and concludes that the taxpayer has not established by clear and convincing proof that local law and the alimony trust have given the divorced husband a full discharge, leaving no continuing obligation, however contingent.

MR. JUSTICE REED concurred in the result.

MR. JUSTICE McREYNOLDS dissented.

The case was argued on January 5th and 8th, 1940, by Mr. Arnold Raum for the petitioner and by Mr. William D. Mitchell and Mr. Arnold F. Schaetzle for respondent.

Taxation—Minnesota Tax on Gross Earnings of Railroad Corporations

Illinois Central Railroad Co. v. Minnesota, 84 Adv. Op. 377; — Sup. Ct. Rep. — (No. 222, decided January 29, 1940).

This is an appeal to review a judgment of the Supreme Court of Minnesota. In an opinion by MR. JUSTICE DOUGLAS, the Supreme Court affirmed the judgment of the Supreme Court of Minnesota sustaining a 5% tax on gross earnings as applied to the Illinois Central Railroad Company in respect of railroad cars of that road used in Minnesota. The tax has been construed and sustained in various applications as a property tax.

The controversy under review involves the application of a formula devised to ascertain the taxable earnings in the absence of precise records as to the use of cars in the State.

The Illinois Central is one of thirteen roads operating in Minnesota. It owns no lines within the State but operates leased lines with 30.15 miles of track. The item of gross earnings sought to be taxed arises out of debits and credits for the exchange of freight cars which the appellant makes with other railroads in the State, the using road being charged \$1.00 per day. The formula here applied and challenged by the appellant operates as follows:

Each road operating in the State is charged with such percentage of the credit balances owing from each using railroad operating in the State as is determined by ascertaining the ratio of each user's Minnesota revenue freight car miles to its system car miles.

Each road operating in the State is given credit for such percentage of the debit balances owing each other road operating in the State as is determined by ascertaining the ratio of the reporting railroad's Minnesota revenue freight car miles to its system car miles.

The credit and debit balances are then computed and apportioned annually and the net credits are then ascertained. The statutory 5% tax is applied to the net credits so ascertained.

The Supreme Court recognizes that the apportionment under the formula may not result in mathematical exactitude. But the tax as applied under the formula is sustained against the appellant's challenge of a denial of equal protection under the Fourteenth Amendment. Constitutional objection based on the Commerce clause is also rejected by the Supreme Court.

The case was argued by Mr. Charles A. Helsell for the appellant, and by Mr. John A. Weeks for the appellee.

Portraits of Five
Associate Justices

First United States
Supreme Court

JOHN RUTLEDGE
1789-1791

WM CUSHING
1789-1810

JAMES WILSON
1789-1798

JOHN BLAIR 1789-1796

JAMES IREDELL 1790-1799

DECISIONS ON THE FEDERAL RULES OF CIVIL PROCEDURE

FROM BULLETINS 58, 59, 60 and 61 ISSUED BY THE DEPARTMENT OF JUSTICE

RULE 4—Process—Sub. (f)—Territorial Limits of Effective Service

Katherine Koncewicz v. East Liverpool City Hospital. (W. D. Pa., McVICAR, D. J.).

In the exercise of discretion, the court entertained a motion to quash summons which was served on a non-resident defendant beyond the limits of the state although the motion was filed several days after time to answer had expired.

RULE 8—General Rules of Pleading—Sub. (c)—Affirmative Defenses

C. G. Bridges v. Cletis Dahl (C. C. A. 6, HAMILTON, C. J., Dec. 14, 1939).

The issue of contributory negligence may not be raised by a general denial, if the plaintiff does not plead freedom from contributory negligence.

Sub. (e)—Pleading to Be Concise and Direct; Consistency

Sadie Dellefield v. Blockdel Realty Co., Inc. (S. D. N. Y., CONGER, D. J., Dec. 29, 1939).

1. A pleading which contains evidentiary and unnecessary matter and which is not simple, concise and direct, should be revised to comply with the Rules.

2. The claims of plaintiff as an individual and as administratrix of an estate should be set out in separate counts. (Rule 10 (b)).

3. A stockholder's derivative action should be clearly alleged as such. (Rule 23 (b)).

RULE 10—Form of Pleadings—Sub. (b)—Paragraphs; Separate Statements

Sadie Dellefield v. Blockdel Realty Co., Inc. (S. D. N. Y., CONGER, D. J. Dec. 29, 1939).

The claims of plaintiff as an individual and as administratrix of an estate should be set out in separate counts.

RULE 11—Signing of Pleadings

Myrtle De Montis v. Potomac Electric Power Co. (D. of C., LETTS, J., Jan. 22, 1940).

If a pleading is filed without signature by at least one attorney of record in his individual name, leave to comply with the Rule may subsequently be granted by the court.

RULE 12—Defenses and Objections—When and How Presented—Sub. (b)—How Presented

Al Roloff v. William O. Perdue (N. D. Ia., E. D., SCOTT, D. J., Dec. 28, 1939).

If the objections set forth in a motion to dismiss for

insufficiency are found invalid, the court should not dismiss for insufficiency of its own motion on some other ground, since to do so would deprive the pleader of his right to amend.

Redlands Foothill Groves v. Harold D. Jacobs. (S. D. of Cal., C. D., YANKWICH, D. J., Jan. 5, 1940).

Cooperative associations of citrus fruit growers in California brought an action in the Federal court in that state for injunctive and declaratory relief against the enforcement of regulations promulgated under the Fair Labor Standards Act. The administrator of the Wage and Hour Division, Department of Labor, whose official residence is in the District of Columbia, and regional officers of the division in California, were joined as defendants. The complaint was dismissed as to the administrator on the ground that he was a resident of the District of Columbia. *Held*, the complaint should be dismissed for insufficiency since the administrator was an indispensable party and the relief sought could not be granted as against the remaining defendants, who lacked authority to institute proceedings for violations of the regulations.

Sub. (c)—Motion for Judgment on the Pleadings

Eva Perin Dysart et al. v. Remington Rand, Inc., Eva Perin Dysart v. Remington Rand, Inc. (D. of Conn., HINCKS, D. J., Dec. 29, 1939).

1. A motion for judgment on the pleadings is not appropriate to test the legal sufficiency of some of the defenses set forth in the answer, since such a motion is proper only if all the defenses are insufficient and the moving party is entitled to judgment.

2. A motion to strike is not appropriate to test the legal sufficiency of a defense. (Rule 12 (f))

3. The sufficiency of a defense may be tested by objections thereto, which may be passed on in advance of trial. (Rule 12 (h)).

EDITORIAL NOTE: In the following cases, it has been held that a motion to strike may be invoked to test the sufficiency of a defense: *Nordman v. Johnson City* (E. D. Ill., Jan. 11, 1939) 13 Bull. 3; *Phoenix Hardware Company v. Paragon Paint & Hardware Corporation* (E. D. N. Y. Apr. 18, 1939) 27 Bull. 23; *United States v. Palmer et al.* (S. D. N. Y. June 2, 1939) 36 Bull. 9.

Sub. (e)—Motion for More Definite Statement or for Bill of Particulars

Minnie Sheehan v. Municipal Light and Power Co. (S. D. N. Y. CONGER, D. J., Dec. 6, 1939).

1. An allegation of beneficial ownership of stock by plaintiff in a stockholder's derivative action is a conclusion of law and defendant is entitled to a bill of par-

particulars stating generally the facts under which the beneficial ownership arose and existed.

2. An allegation that defendant in a stockholder's derivative action permitted a judgment to be entered against the corporation is a conclusion of law and should be amplified by a bill of particulars.

Sub. (f)—Motion to Strike

Radtke Patents Corporation v. C. J. Tagliabue Manufacturing Co., Inc. (E. D. N. Y., CAMPBELL, D. J., Dec. 28, 1939).

1. Allegations should not be stricken from an answer even if shown to be false, if they may raise an issue under any contingency.

2. Motions to strike are not favored and should be granted only when the matter attacked has no possible relation to the controversy.

3. Liberal pleading should be permitted in defense of an allegation of fraud.

Eva Perin Dysart et al. v. Remington Rand, Inc.; *Eva Perin Dysart v. Remington Rand, Inc.* (D. of Conn., HINCKS, D. J., Dec. 29, 1939).

A motion to strike is not appropriate to test the legal sufficiency of a defense.

Sub. (h)—Waiver of Defenses

Eva Perin Dysart et al. v. Remington Rand, Inc.; *Eva Perin Dysart v. Remington Rand, Inc.* (D. of Conn., HINCKS, D. J., Dec. 29, 1939).

The sufficiency of a defense may be tested by objections thereto, which may be passed on in advance of trial.

State of Missouri and to Use of Roy N. De Vault v. Fidelity & Casualty Co. of New York (C. C. A. 8, DEWEY, D. J., Nov. 8, 1939).

The court may grant a motion to dismiss which is contained in a motion for judgment on the pleadings.

RULE 13—Counterclaim and Cross-Claim—

Sub. (a)—Compulsory Counterclaims

Forstner Chain Corporation v. Gemex Co. (D. of N. J., FAKE, D. J., Jan. 23, 1940).

1. In an action for infringement of a patent by an assignee of the claim, a counterclaim for unfair competition should be dismissed in the absence of the owner of the patent who is an indispensable party to such counterclaim.

2. A counterclaim may not be maintained solely for the purpose of preventing plaintiff from dismissing the action, since after answer plaintiff may dismiss only with consent of the court and leave to do so will not be granted except under proper circumstances. (Rule 41 (a) (2))

Sub. (b)—Permissive Counterclaims

E. G. Staude Manufacturing Co. v. Berles Carton Co., Inc., The International Paper Box Machine Company, Intervenor. (E. D. N. Y., CAMPBELL, D. J., Dec. 29, 1939).

1. An intervening defendant may not interpose a counterclaim not arising out of the same transaction as that involved in the original suit. (Rule 24 (a)).

2. An intervening defendant in a patent suit may not amend his answer by interposing a counterclaim based on a charge of unfair competition. (Rule 24 (a)).

Sub. (h)—Additional Parties May be Brought In

Carter Oil Company v. Charles L. Wood, First State Bank of Beecher City, Defendant in Counterclaim. (E. D. Ill., LINDLEY, D. J., Jan. 18, 1940).

1. In an action in which jurisdiction is based on diversity of citizenship, defendant interposed a counterclaim arising out of the same subject matter and brought in an additional party defendant to the counterclaim. Held, no diversity of citizenship was required between original and an additional defendant to give court jurisdiction over the counterclaim.

2. In an action involving title to land, all persons claiming interest as grantees may be joined as parties since their presence is necessary for a final disposition of all questions of title, if such joinder does not deprive the court of jurisdiction of the action. (Rule 19 (b))

RULE 14—Third-Party Practice—Sub. (a)—When Defendant May Bring in Third Party

General Taxicab Association, Inc., v. Henrietta C. O'Shea (C. A. D. of C., STEPHENS, A. J., Jan. 15, 1940).

1. In an action for personal injuries resulting from an automobile collision, against the driver of one of the cars, the court in the exercise of discretion refused leave to bring in as a third-party the driver of the car in which plaintiff was riding, it appearing that plaintiff declined to amend his complaint so as to assert a claim against the third-party.

2. Leave to bring in a third-party is not a matter of right, but rests in the discretion of the court.

Annie Lou Elliott v. Armour & Co., Armour & Co. v. Southern Ice Co. (E. D. S. C., MYERS, D. J., Nov. 25, 1939).

In an action for wrongful death against a third party by a compensation insurance carrier which had paid the award, under its right of subrogation, defendant may bring in the employer of plaintiff's intestate as third-party defendant.

RULE 15—Amended and Supplemental Pleadings

—Sub. (c)—Relation Back of Amendments

James F. White v. Holland Furnace Company, Inc. (S. D. Ohio, E. D., UNDERWOOD, D. J., Dec. 27, 1939).

1. In an action for breach of contract, an amendment alleging a statutory basis of liability arising out of the same circumstances relates back to the original complaint and is not barred by expiration of the period of the statute of limitations during the interim between institution of suit and filing of amendment.

2. An amendment may not introduce a new claim for relief barred by the statute of limitations.

(See prior opinion in this case, 51 Bull. 7.)

RULE 17—Parties Plaintiff and Defendant; Capacity—Sub. (a)—Real Party in Interest

Farmers Underwriters Association v. John G. Wanner. (D. of Idaho, E. D., CAVANAH, D. J., Nov. 7, 1938).

In an action for declaratory relief against liability under an automobile insurance policy, plaintiff insurance company which executed and delivered the policy as attorney in fact for the issuing company, is the real party in interest, since it is a trustee of an express trust and also a party in whose name a contract has been made for the benefit of another.

RULE 18—Joinder of Claims and Remedies—Sub.**(a)—Joinder of Claims**

Corning Glass Works v. John L. Pasmantier (S. D. N. Y., WOOLSEY, D. J., Dec. 18, 1939).

Federal jurisdiction having attached in an action for trademark infringement and unfair competition between citizens of the same state, it will be retained for disposition of the unfair competition claim although the claim for trade-mark infringement is dismissed.

Sub. (b)—Joinder of Remedies; Fraudulent Conveyances

The Cheney Company v. Bruce S. Branson (D. of C., Jan. 8, 1940).

In an action for money judgment, a debtor of the defendant may not be joined as an additional defendant for the purpose of enjoining him from paying over the money to the first defendant without compliance with the requirements relating to an attachment, since such a proceeding is in effect an application for an attachment.

RULE 19—Necessary Joinder of Parties—Sub. (b)—Effect of Failure to Join

The Texas and Pacific Railway Co. v. Elgin, Joliet and Eastern Railway Co. (N. D. Ill., E. D., HOLLY, D. J., Jan. 5, 1940).

In an action for money judgment, a person who may be liable over to the defendant is not an indispensable party and failure to join such person is not ground for dismissal.

Carter Oil Company v. Charles L. Wood, First State Bank of Beecher City, Defendant in Counterclaim. (E. D. Ill., LINDLEY, D. J., Jan. 18, 1940).

In an action involving title to land, all persons claiming interest as grantees may be joined as parties since their presence is necessary for a final disposition of all questions of title, if such joinder does not deprive the court of jurisdiction of the action.

RULE 23—Class Actions—Sub. (a)—Representation

Manuel Pelelas v. Caterpillar Tractor Co. (S. D. Ill., N. D., ADAIR, D. J., Nov. 10, 1939).

A former member of a group of employees insured under a group insurance policy held not sufficiently representative of the group to entitle him to bring a class action against the employer to recover surplus funds paid to the latter which under the terms of the policy were to be applied to the payment of subsequent premiums.

Sub. (b)—Secondary Action by Shareholders

Jules E. Piccard v. Sperry Corporation (S. D. N. Y., COXE, D. J., March 13, 1939).

1. A stockholder in a holding company may maintain a derivative suit for illegal acts of the directors of a subsidiary corporation wholly owned by the holding company.

2. In a stockholder's derivative action, the fact that plaintiff is holder of only a few shares of stock is not a valid objection to taking deposition of defendant directors. (Rule 30 (b)).

3. The taking of depositions should not be postponed until a complete bill of particulars has been furnished, it appearing that an order precluding testimony has already been made. (Rule 30 (b)).

Sadie Dellefield v. Blockdel Realty Co., Inc. (S. D. N. Y., CONGER, D. J., Dec. 29, 1939).

A stockholder's derivative action should be clearly alleged as such.

RULE 24—Intervention—Sub. (a)—Intervention of Right

E. G. Staude Manufacturing Co. v. Berles Carton Co., Inc., The International Paper Box Machine Co., Intervener (E. D. N. Y., CAMPBELL, D. J., Dec. 29, 1939).

An intervening defendant may not interpose a counterclaim not arising out of the same transaction as that involved in the original suit.

An intervening defendant in a patent suit may not amend his answer by interposing a counterclaim based on a charge of unfair competition.

In the Matter of U. S. Realty and Improvement Co. Securities and Exchange Commission v. U. S. Realty and Improvement Co. (C. C. A. 2, SWAN, C. J., Jan. 15, 1940).

The Securities and Exchange Commission may not intervene in an arrangement proceeding under Chapter XI of the Bankruptcy Act since no right to intervene in such proceedings is conferred by any statute of the United States and a governmental agency has no general right of intervention "in the public interest."

In the Matter of Credit Service, Inc., Securities and Exchange Commission, Petitioner for leave to intervene. (D. of Md., CHESNUT, D. J., Jan. 18, 1940).

The Securities and Exchange Commission should not be granted leave to intervene in a proceeding for an arrangement under Chapter XI of the Bankruptcy Act for the purpose of obtaining a determination of the question whether the debtor corporation should have proceeded under Chapter X for corporate reorganization, in which event the commission would have express statutory right to intervene.

RULE 25—Substitution of Parties—Sub. (c)—Transfer of Interest

Mabel I. Myers v. The Canton National Bank of Canton, Ill. (C. C. A. 7, EVANS, C. J., Jan. 15, 1940).

In a notice of appeal in an action against a bank and its receiver in which there is a change of receivers subsequently to the commencement of the action, the new receiver need not be named as appellee, unless there has been a substitution of parties. (Rule 73 (b)).

RULE 30—Depositions Upon Oral Examination—Sub. (b)—Orders for the Protection of Parties and Deponents

Jules E. Piccard v. Sperry Corporation (S. D. N. Y., COXE, D. J., March 13, 1939).

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The taking of depositions should not be postponed until a complete bill of particulars has been furnished, it appearing that an order precluding testimony has already been made.

Morton Zuckerman v. Israel Pilot (S. D. N. Y., HULBERT, D. J., Jan. 13, 1940).

A notice to take depositions should not be vacated on a mere allegation, without proof, that the examina-

tion was sought in bad faith or would subject the party to a penalty or forfeiture. If these facts appear while the examination is in progress, the examination may be then terminated.

RULE 33—Interrogatories to Parties

E. I. Du Pont De Nemours & Co. v. Clarence Parrish Byrnes (S. D. N. Y., HULBERT, D. J., Dec. 12, 1939).

1. A plaintiff in a patent suit may be required by interrogatories to specify in detail what device or process are charged to infringe the several claims of the patent.

2. It is proper to address an interrogatory to a plaintiff in a patent suit as to whether he has used the patented invention on a commercial scale.

3. In a patent suit, the plaintiff may be asked by interrogatories to state the meaning of technical expressions used in the patent.

4. An interrogatory in a patent suit calling for a statement of the features alleged to be novel in the various claims, is improper as calling for an interpretation of the patent.

5. The plaintiff in a patent in suit may be required by interrogatories to state whether he has offered to assign the patent or to grant licenses thereunder, and, if the answer be in the affirmative, to give the names of any such persons, and, if any such persons acquired licenses, to furnish copies thereof.

6. In an action for a declaratory judgment on a patent in which defendant counterclaims for infringement of other patents, defendant's interrogatories concerning plaintiff's processes should be limited to the period beginning six years prior to the filing of the counterclaim instead of six years prior to the commencement of the action.

7. An interrogatory in a patent suit necessitating revelation of secret processes or details of all products made by the party charged with infringement, irrespective of whether such products have any relation to the patent in suit or not, is improper.

Sears, Roebuck and Co. v. Carter H. Harrison (N. D. Ill., E. D., HOLLY, D. J., Jan. 8, 1940).

Answers to interrogatories may be ordered without a determination that such answers will be admissible in evidence. If the answers prove to be admissible, having the information in the record will expedite the proceedings.

Nakken Patents Corporation v. Jacob Rabinowitz; Radtke Patent Corporation v. Jacob Rabinowitz (E. D. N. Y., CAMPBELL, D. J., Jan. 2, 1940).

1. In a patent suit, the fact that defendant served the statutory notice listing prior art, is not a valid objection to an interrogatory requesting him to state which items of prior art declared will be offered at the trial.

2. An interrogatory in a patent suit requiring defendant to furnish copies of sketches, drawings or blue prints which are not in his possession or under his control, is improper.*

3. An interrogatory calling for an opinion on evidentiary matter is improper.

4. The fact that the items called for are or should be within the knowledge of the moving party, does not constitute an objection to an interrogatory.

5. Interrogatories to defendant in a patent suit must

be limited to a period prior to the filing date of the application for the patent in suit.

RULE 34—Discovery and Production of Documents and Things for Inspection, Copying, or Photographing

Federal Life Insurance Co. v. Michael Holod (M. D. Pa., WATSON, D. J., Jan. 12, 1940).

World War Draft records are privileged and consequently not subject to production.

Irene Seals v. Capital Transit Co. (D. of C., LETTS, J., Jan. 11, 1940).

In the absence of a showing of good cause, a party should not be required to produce statements of witnesses obtained by him in preparation for trial other than such statements signed by the moving party himself.

Radtke Patents Corporation v. Jacob Rabinowitz (E. D. N. Y., MOSCOWITZ, D. J., Jan. 17, 1940).

Production of documents should not be ordered on a bare conclusion of the moving party that the desired documents contain relevant and material matter which is of prime importance in the action. Before such an application is granted, the moving party should show that the documents are material.

R. E. Wood v. J. F. Morrissey (W. D. La., M. D., PORTERIE, D. J., Jan. 18, 1940).

In an action for personal injuries against the liability insurance carrier of plaintiff's employer, plaintiff's motion for production of the contract of insurance was overruled as being too late, it appearing that it was filed eighteen months after the answer which denied the existence of such a contract.

RULE 36—Admission of Facts and of Genuineness of Documents—Sub. (a)—Request for Admission

Unlandherm v. Park Contracting Corp. (S. D. N. Y., BONDY, D. J., Jan. 17, 1940).

1. A request for admission of facts is not subject to a motion to strike.

2. Requests for admissions may relate to statements of facts contained in the request and need not be limited to statements in documents attached to a request.

Securities and Exchange Commission v. Payne (S. D. N. Y., CONGER, D. J., Jan. 19, 1940).

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Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., Inc. (E. D. N. Y., MOSCOWITZ, D. J., Jan. 19, 1940).

1. In an action for patent infringement, plaintiff may properly be requested to admit the dates of publication of prior art references cited by defendant in his answer.

2. A request for admission of facts is not invalidated by failure to designate therein a time limit within which reply should be made.

3. A party may request admission of facts which

*It was held in *O'Rourke v. RKO Radio Pictures, Inc.* (D. Mass., May 19, 1939) 32 Bull. 28, 27 F. Supp. 996, that interrogatories may not be invoked to secure the production of documents, on the ground that the appropriate course is to move for the production of documents under Rule 34. [Ed.]

may not be within the knowledge of the party requested to make the admission.

4. A motion to dismiss does not lie to test the sufficiency of a request for admission of facts, since if the party is unable to reply to the request he may file a sworn statement to that effect.

RULE 38—Jury Trial of Right—Sub. (b)—Demand

Sue A. Glauber v. Agee Department Stores (W. D. Ky., MILLER, D. J., Dec. 26, 1939).

If an amendment abandons the claim for equitable relief contained in the original complaint and interposes a claim for common law relief, the time to demand a trial by jury commences to run from the service of the amended complaint.

RULE 41—Dismissal of Actions—Sub. (a)—Voluntary Dismissal: Effect Thereof—Par.

(1)—By Plaintiff; By Stipulation

Scott I. Rader v. Baltimore & Ohio Railroad Co. (C. C. A. 7, MAJOR, C. J., Jan. 17, 1940).

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Forstner Chain Corporation v. Gemex Co. (D. of N. J., FAKE, D. J., Jan. 23, 1940).

A counterclaim may not be maintained solely for the purpose of preventing plaintiff from dismissing the action, since after answer plaintiff may dismiss only with consent of the court and leave to do so will not be granted except under proper circumstances.

RULE 49—Special Verdicts and Interrogatories—Sub. (a)—Special Verdicts

Dallas Railway & Terminal Co. v. T. R. Sullivan (C. C. A. 5, HUTCHESON, C. J., Jan. 6, 1940).

A party may not object to the court's failure to submit special issues to the jury in a case submitted on a general charge.

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1. There need not be an affirmative showing that the court informed counsel before argument of its proposed action upon requests for instructions, and in the absence of a showing to the contrary it will be presumed that the rule was complied with.

2. A party may not object to the court's failure to submit special issues to the jury in a case submitted on a general charge. (Rule 49 (a)).

3. A party may not complain of the court's failure to give instructions which were not requested in writing.

RULE 52—Findings by the Court—Sub. (a)—Effect

Ernest H. Nichols v. Minnesota Mining & Manufacturing Co. (C. C. A. 4, PARKER, C. J., Jan. 9, 1940).

Findings in actions under Revised Statutes 4915 to establish priority of right to a patent are subject to

appellate review under Rule 52, as in other cases tried by the court without a jury.

RULE 54—Judgments; Costs—Sub. (d)—Costs

A. W. Mellon v. D. B. Heiner; Jennie King Mellon v. D. B. Heiner (W. D. Pa., GIBSON, D. J., Dec. 28, 1939).

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Max Asher v. United States of America. (S. D. Cal., C. D., JENNEY, D. J., Aug. 4, 1939).

In an action under the Tucker Act in which the Government is the prevailing party, the clerk should tax as costs the attorney's docket fee but not the fee for filing answer or the fee for acknowledging defendant's cost bill, since the two last mentioned fees were not paid to the clerk within the meaning of Section 15 of the Tucker Act, which permits allowance as costs of expenses actually incurred and fees paid to the clerk.

RULE 55—Default—Sub. (b)—Judgment—Par. (2)—By the Court

State of Missouri and to Use of Roy N. De Vault v. Fidelity & Casualty Co. of New York (C. C. A. 8, DEWEY, D. J. Nov. 8, 1939).

1. Filing of a demurrer prior to the effective date of the Rules constitutes an appearance and thereafter default judgment may be obtained only upon application to the court and notice.

2. A demurrer may be treated as a motion to dismiss for insufficiency.

3. The court may grant a motion to dismiss which is contained in a motion for judgment on the pleadings. (Rule 12 (h))

4. An appeal should not be dismissed for failure to file an assignment of errors or statement of points to be relied on if the general propositions relied on for reversal may be determined from the record. (Rule 75 (d))

RULE 56—Summary Judgment—Sub. (b)—For Defending Party

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Sub. (e)—Form of Affidavits; Further Testimony

E. Margery Fox v. Johnson & Wimsatt. (D. of C. LUHRING, J., Jan. 24, 1940).

An affidavit in support of a motion for summary judgment which seeks to alter, vary or contradict the terms of a resolution adopted by a corporation, is subject to a motion to strike since such affidavit is an attempt to vary the terms of a written instrument by parol evidence and therefore inadmissible.

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An employer's liability insurance company brought an action against the insured employer and an employee of the latter who had filed suit in the state court against the insured, seeking a declaratory judgment as to the insurer's liability under the policy and an injunction to restrain further prosecution of the action in the state court, in which insurer had undertaken the defense in compliance with the terms of its policy but with reservations as to its further liability. *Held*, action for declaratory judgment should be dismissed since no actual controversy existed.

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2. The New York rule that interest on judgments runs from the date of the verdict rather than from the date of the judgment obtains in the Federal courts in New York.

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W. B. Isgrig v. U. S. (C. C. A. 4, PARKER, C. J., Jan. 8, 1940).

1. To secure consideration of a motion for a new trial after appeal has been taken, the moving party should move in the appellate court to remand the case.

2. An order refusing to remit the forfeiture of an appearance bond in a criminal case which disposes of petitioner's right to remission and with regard to which no further proceedings can be had, is a final order and therefore appealable. (Rule 73 (a))

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1. A trustee in bankruptcy may not invoke state execution statutes to require the bankrupt to make payments to him out of income from a trust estate.

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Genevieve P. St. Marie v. U. S. and 17 other cases. (C. C. A. 9, HANEY, C. J., Jan. 3, 1940).

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2. Failure to file a cost bond on appeal does not affect the validity of the appeal.

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A party desiring to prosecute in forma pauperis an appeal in a habeas corpus proceeding must apply for such privilege to the district court before filing a notice of appeal. If the application is denied for any reason other than lack of good faith, it may be presented to the circuit court of appeals. (Rule 81 (a))

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Supplemental cumulative list of cases published in Department of Justice Bulletins, that are also reported in Federal Reporter system.—This list supplements the list published in the December, 1939 issue of the JOURNAL, page 1066.

ALEXANDER HOLTZOFF

Special Assistant to the Attorney General

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Rule 37*Subdivision (d)*

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Rule 38*Subdivision (a)*

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Rule 39*Subdivision (a)*

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Rule 53*Subdivision (b)*

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Connecticut Co., In re (C. C. A. 2) 107 F. (2d) 734.

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Rule 56*Subdivision (a)*

Fink v. Northwestern Mut. Life Ins. Co. of Milwaukee, Wis. (Wolf, Third-Party Defendants) (E. D. Mich.) 29 F. Supp. 972.

Saunders v. Higgins, Collector of Internal Revenue (S. D. N. Y.) 29 F. Supp. 326.

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McGrath v. Helena Rubinstein, Inc. (S. D. N. Y.) 29 F. Supp. 822.

Tracy, Application of (C. C. A. 2) 106 F. (2d) 96.

Mutual Life Ins. Co. of New York v. O'Donnell (N. D. Ill.) 29 F. Supp. 1010.

Nickelson v. Nestles Milk Products Corporation, Inc. (C. C. A. 5) 107 F. (2d) 17.

Van Wormer v. Champion Paper and Fibre Co. (S. D. Ohio) 28 F. Supp. 813.

Hoffman v. N. J. Federation of Young Men's and Young Women's Hebrew Assns. (C. C. A. 3) 106 F. (2d) 204.

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Banco De Espana v. Federal Reserve Bank of New York.

Same v. United States Lines Co.

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Rule 62*Subdivision (a)*

Manufacturers Equipment Co., United States, Now for Use of, v. Rugh (W. D. Pa.) 29 F. Supp. 40.

Rule 66

Bicknell v. Lloyd-Smith (E. D. N. Y.) 29 F. Supp. 929.

Rule 69*Subdivision (a)*

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Rule 73*Subdivision (a)*

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Siegal v. Margiotta (C. C. A. 2) 102 F. (2d) 525.

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Guanajuato Reduction & Mines Co., In re (D. N. J.) 29 F. Supp. 789.

Prudence Co. Inc., In re (E. D. N. Y.) 29 F. Supp. 630.

Reconstruction Finance Corporation, Application of (E. D. N. Y.) 29 F. Supp. 630.

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NOTICE BY THE BOARD OF ELECTIONS

The following states will elect a State Delegate for a three-year term in 1940:

Arkansas	Louisiana	Ohio
Colorado	Maryland	Oregon
Delaware	Minnesota	Rhode Island
Georgia	Nevada	Utah
Idaho	New Hampshire	West Virginia
Indiana	New York	

The following states will elect a State Delegate to fill vacancies for a term to expire at the adjournment of the 1941 Annual Meeting:

New Mexico	Territorial Group	(Alaska, Canal Zone, Philippine Islands)
Wisconsin		

The following states, in addition to electing a State Delegate for a three-year term, will also elect a State Delegate to fill a vacancy expiring with the adjournment of the 1940 Annual Meeting:

Arkansas	Delaware	West Virginia
Colorado	Rhode Island	

Any additional vacancies which may occur prior to February 15, 1940, will also be filled at the general election.

Nominating petitions for all State Delegates to be elected in 1940 must be filed with the Board of Elections not later than April 12, 1940. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies, may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. Nominating petitions, in order to be timely, must actually be received at the headquarters of the Association

before the close of business at 5:00 P. M. on April 12, 1940.

State Delegates elected to fill vacancies take office immediately upon the certification of their election. State Delegates elected for a three-year term take office at the adjournment of the 1940 Annual Meeting of the Association.

Attention is called to Section 5, Article V, of the Constitution, which provides:

"Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group)."

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing.

Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Ballots will be mailed to the members in good standing accredited to the States, in which elections are to be held, within thirty days after the time for filing nominating petitions expires.

Nominating petitions will be published in the next succeeding issue of the AMERICAN BAR ASSOCIATION JOURNAL which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the JOURNAL.

While there is no restriction on the maximum number of names which may be signed to a nominating petition, in the interest of conserving space in the JOURNAL the Board of Elections suggests that not more than fifty names be secured to a nominating petition.

EDWARD T. FAIRCHILD,
Chairman of the Board of Elections.

Rule 36*Subdivision (a)*

- Hanauer for Use of Wogahn v. Siegel (N. D. Ill.) 29 F. Supp. 329.
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New York Credit Men's Ass'n v. Chaityn (S. D. N. Y.) 29 F. Supp. 652.

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Van Wormer v. Champion Paper and Fibre Co. (S. D. Ohio) 28 F. Supp. 813.
Hoffman v. N. J. Federation of Young Men's and Young Women's Hebrew Assns. (C. C. A. 3) 106 F. (2d) 204.

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- Banco De Espana v. Federal Reserve Bank of New York.
Same v. United States Lines Co.
Same v. Solomon.
(S. D. N. Y.) 28 F. Supp. 958.

Subdivision (e)

- Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey (C. C. A. 2) 104 F. (2d) 659.

Rule 62*Subdivision (a)*

- Manufacturers Equipment Co., United States, Now for Use of, v. Rugh (W. D. Pa.) 29 F. Supp. 40.

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Reconstruction Finance Corporation, Application of (E. D. N. Y.) 29 F. Supp. 630.

Rule 81*Subdivision (a)*

Montagna v. Norton, Deputy Commissioner of United

States Employees' Compensation Commission (D. N. J.) 28 F. Supp. 997.

Subdivision (b)

Levine v. Farley, Postmaster General (U. S. C. A., D. C.) 107 F. (2d) 186.
George Allison & Co., Inc., v. Interstate Commerce Commission (U. S. C. A., D. C.) 107 F. (2d) 180.
Brooks v. Caruthers (W. D. Pa.) 25 F. Supp. 413.

Subdivision (c)

Galloway v. Genl. Motors Acceptance Corp. (C. C. A. 4) 106 F. (2d) 466

Rule 83

Clair v. Philadelphia Storage Battery Co. (E. D. Pa.) 29 F. Supp. 299.
Wells v. Equitable Life Assur. Soc. of the U. S. (W. D. Ky.) 29 F. Supp. 144

Rule 86

Lantana, Fla., Town of, v. Hopper (C. C. A. 5) 102 F. (2d) 118.
Western Union Tel. Co. v. Nester (C. C. A. 9) 106 F. (2d) 587

NOTICE BY THE BOARD OF ELECTIONS

The following states will elect a State Delegate for a three-year term in 1940:

Arkansas	Louisiana	Ohio
Colorado	Maryland	Oregon
Delaware	Minnesota	Rhode Island
Georgia	Nevada	Utah
Idaho	New Hampshire	West Virginia
Indiana	New York	

The following states will elect a State Delegate to fill vacancies for a term to expire at the adjournment of the 1941 Annual Meeting:

New Mexico	Territorial Group	(Alaska, Canal Zone, Philippine Islands)
Wisconsin		

The following states, in addition to electing a State Delegate for a three-year term, will also elect a State Delegate to fill a vacancy expiring with the adjournment of the 1940 Annual Meeting:

Arkansas	Delaware	West Virginia
Colorado	Rhode Island	

Any additional vacancies which may occur prior to February 15, 1940, will also be filled at the general election.

Nominating petitions for all State Delegates to be elected in 1940 must be filed with the Board of Elections not later than April 12, 1940. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies, may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. Nominating petitions, in order to be timely, must actually be received at the headquarters of the Association

before the close of business at 5:00 P. M. on April 12, 1940.

State Delegates elected to fill vacancies take office immediately upon the certification of their election. State Delegates elected for a three-year term take office at the adjournment of the 1940 Annual Meeting of the Association.

Attention is called to Section 5, Article V, of the Constitution, which provides:

"Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group)."

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing.

Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Ballots will be mailed to the members in good standing accredited to the States, in which elections are to be held, within thirty days after the time for filing nominating petitions expires.

Nominating petitions will be published in the next succeeding issue of the AMERICAN BAR ASSOCIATION JOURNAL which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the JOURNAL.

While there is no restriction on the maximum number of names which may be signed to a nominating petition, in the interest of conserving space in the JOURNAL the Board of Elections suggests that not more than fifty names be secured to a nominating petition.

EDWARD T. FAIRCHILD,
Chairman of the Board of Elections.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

LAW: *A Century of Progress, 1835-1935*, edited by Alison Reppy. 1937. New York: New York University Press. 3 vols.; pp. xxx, 387; 438; 475.

—The occasion for publication of this well bound and beautifully printed set of books was the celebration of the one hundredth anniversary of the founding of the School of Law of New York University. The completion of a century's existence by any American law school is indeed an occasion worthy of public notice, and a critique of that century's law is as appropriate a mode of commemoration as can readily be imagined. The development of this School of Law, one of the largest standard law schools in this country, may be fairly taken as typical not only of the development of legal education in America during the last hundred years, but as typical also of the living growth of the whole body of American law itself during that period.

The three volumes of this set contain some 36 full-length articles, mostly of the type that the law reviews publish. They undertake to cover the principal fields in the law, though the Editor, Professor Alison Reppy, points out in an introductory note that any such effort to cover the whole law must necessarily be incomplete. Most of the articles undertake to trace, for their particular fields, the lines of growth in the law during the past century, or to compare the law of one hundred years ago with that of today, though some of the articles deal more specifically with particular areas of modern law or legal philosophy, and a few deal with the law of other lands.

The writers include Chief Judge Crane of the New York Court of Appeals, Roscoe Pound, Judge Riddell of Ontario, Walter Simons, former Chief Justice of Germany, Joseph Henry Beale, several former presidents of the American Bar Association, Dean Goodrich of Pennsylvania, Dean Wigmore, the late Attorney General G. W. Wickersham, Harold J. Laski, Professor Karl N. Llewellyn, several members of the New York University law faculty, and a score of other lawyers, law professors, philosophers and economists, both American and English.

Comparison With Harvard Law Review Survey

This work invites comparison with the series of some 18 articles which appeared in the fiftieth volume of the Harvard Law Review three years ago, analyzing the last half-century's effect upon the law in each of the 18 areas covered by the articles. Topics of the law dealt with in the two series of articles are of course to some extent the same. The Harvard articles each covered some specific field in the law; the title of each, apart from the reference to the passage of time, was like the subject of a course taught in Law School. The New York University essays cover most of these course subjects, but in addition they deal with legal philosophy

and the legal profession as such. The necessary incompleteness of any such collection of essays is emphasized by some topics omitted: the 36 articles include none on Contracts save as the subject is covered incidentally in Llewellyn's discussion of Sales; the vast topic of Criminal Law and its administration is taken up only in Martin Conboy's good brief historical summary of the federal criminal law.

The style of the 36 articles, as might be expected, varies considerably, running from the scholarly monograph with many footnotes employed by most of the professors writing on course subjects (characteristic of nearly all the articles in the Harvard Law Review series), through the digest-of-the-law-type of article and the semi-popular article such as appears frequently in bar association journals, to the bold law-of-the-future essay which Wigmore's high position in the study of Evidence permits him to present.

Attitudes concerning the law expressed in the three-volume work are of course as divergent as the variant points of view of the 36 who wrote. From such a compilation as this, no unified analysis of the growth of American law over the last hundred years could have been expected; it was not what the editor contemplated. Rather, there are here collected 36 different attitudes toward the law's development, one expressed in reference to civil procedure, two others in reference to Torts, another in reference to whether Capitalism has failed in Law, others in reference to the functions of the American Bar Association and the American Law Institute in the legal scheme of things, and so on through the 36. Probably the only unifying factors operating on all the authors were that they were writing at about the same time (1935 or 1936), and that they were all writing for a publication to be sponsored by a modern American Law School long on the approved list of the American Bar Association. While the importance of these unifying factors must not be too much minimized, they still left wide room for divergence of view.

Principal Areas and Lines of Growth in Law

The work under review does not purport to be a history of American Law for the last century; volumes compiled in this fashion could not constitute a history. But there is much material in the volumes that would be useful in the preparation of such a history. Many of the articles manifest intelligent understanding and careful thought concerning trends in the law and they, along with the Harvard Law Review series, would be of prime usefulness to any lawyer or historian seeking to trace those trends down through the century. They would be even more useful to the ordinary lawyer seeking merely some knowledge of what has happened lately in the law.

A fair question to ask in reviewing such a work as

this would seem to be: To what extent does it indicate the principal areas and lines of growth in law and the legal system during the century which it covers?

What have been those principal areas and lines of growth? For one thing, as Dean Pound brings out in his historical article, we must look for them mostly since the turn of the century. Law, like many other things, has speeded up in the last few decades.

The single field in which growth has been greatest is probably Administrative Law. This field is excellently dealt with in an essay by Arthur T. Vanderbilt, then president-elect of the American Bar Association. Labor Law and Trade Regulation, related areas which owe most of their content to recent changes in the law, are not separately dealt with, though some of the matter of Trade Regulation naturally finds its way into Professor E. Merrick Dodd's discussion of the law governing business associations.

The changing economic scene, with its new inventions and expanding commerce, accounts for much that is new in the law. The automobile has made new law under several heads, including Sales and Torts. The airplane and the radio are well on the way toward similar new law-making. These new growths in the law are at least touched on by Leon Green and Karl Llewellyn in articles abstractly headed. The law of Insurance, though rooted in old decisions, has in its major growth paralleled a recent economic phenomenon which takes no second place even to the automobile in America. This, along with Contracts generally, is among the omitted topics. Conflict of Laws, on the other hand, representing as it does a general expansion of all economic and social forces, is given careful treatment

by Professor Alexander N. Sack of the New York University law faculty.

Possibly the century has seen considerable change in the administration of Criminal Law; there is some argument about that. At any rate there has been much writing about it, and a great many statutes have been changed. As already stated, this is but barely touched on in these volumes. Almost the only far-reaching change in Civil Procedure during the century—the adoption of the new Federal Rules—came after this work was published, but Professor R. W. Millar's splendid monograph entitled "The Old Regime and the New in Civil Procedure" gives an excellent background for appreciation of the new Rules.

Constitutional Law

Most of us like to think that we have seen great changes in Constitutional Law in recent years. Sober thought tells us, though, that interpretation of the Constitution has almost always followed not far behind the political-economic development and needs of the nation. Seen thus, our new Constitutional Law is merely a continuing growth in accustomed directions even though it does involve some scrapping of precedents. And it seems fair to say that the deep delvings of specialists in jurisprudence and legal philosophy are of much the same sort. With perpetual disagreement among themselves they almost keep pace with the law as it in turn almost keeps pace with current economic, social and political thought and action. This reality is tacit in several of the philosophical and constitutional writings which comprise the second volume of the work.

Two other areas of principal recent development are

Nominating Petitions

OHIO

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Charles W. Racine, Toledo, Ohio, for the office of State Delegate for and from the State of Ohio, to be elected in 1940:

Robert Guinther, H. W. Slabaugh, Jerome Taylor, Allan B. Diefenbach, Frank H. Harvey, Carl M. Myers, Edwin W. Brouse, Gillum H. Doolittle, Clarence R. Foust, Meryll F. Sicherman, Francis Seiberling, C. G. Roetzel, D. W. Maxon, S. C. Andress, R. M. Cobbs, Donald Gottwald, Clyde F. Berry, W. E. Slabaugh, of Akron.

Murray Seasingood, Clyde M. Abbott, Rowland Shepard, Murray M. Shoemaker, Simeon M. Johnson, Charles P. Taft, Charles M. Leslie, Morison R. Waite, M. L. Ferson, Lester A. Jaffe, of Cincinnati.

H. J. Crawford, P. J. Mulligan, W. T. Kinder, John B. Dempsey, Jos. C. Hostetler, M. DeVaughn, Thos. M. Kirby, John W. Barkley, Chas. M. Buss, of Cleveland.

Carlton S. Dargusch, Henry G. Binns, John C. Harlor, Dale Dunifon, Earl F. Morris, J. L. W. Henney, Phil S. Bradford, H. Bartley Arnold, Jr., Hugh K. Martin, of Columbus.

Andrew S. Iddings, William G. Pickrel, Robert F. Young, Geo. R. Murray, F. D. Schnacke, of Dayton.

Howard F. Guthery, of Marion.

G. Ray Craig, of Norwalk.

Joseph D. Stecher, E. J. Marshall, Milo J. Warner, Ray Martin, Richard D. Logan, J. I. O'Connor, of Toledo.

Wm. A. Mason, of Youngstown.

MARYLAND

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate T. Scott Offutt, of Towson, Maryland, for the office of State Delegate for and from the State of Maryland, to be elected in 1940:

John Holt Richardson, Walter V. Harrison, Samuel J. Fisher, Charles G. Page, S. C. Berenholtz, Herman W. Kramer, William Taft Feldman, Joseph G. Blandi, Albert A. Levin, Frederick W. Brune, Paul F. Due, Albert F. Donaldson, Wendell D. Allen, John M. Butler, Harold Tschudi, Charles B. Hoffman, E. Paul Mason, James W. Chapman, Jr., Robert France, Joseph L. McAllister, Alfred J. O'Ferrall, Morton P. Fisher, Paul M. Higinbotham, G. C. A. Andersen, Leon H. A. Piereson, Theodore R. Dankmeyer, Edwin H. Brownley of Baltimore.

WEST VIRGINIA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Frank C. Haymond, of Fairmont, for the office of State Delegate for and from the State of West Virginia, to be elected in 1940 for the regular three-year term:

Thomas B. Jackson, R. G. Kelly, Benj. B. Brown, John C. Morrison, Perkeley Minor, Jr., J. Horner Davis, 2nd, W. C. Revercomb, John V. Ray, and Melville Stewart, of Charleston;

George M. Hoffheimer, Lawrence R. Lynch, Howard L. Robinson, James M. Guiher, Clifford R. Snider, Kemble White, M. G. Sperry, and W. G. Stathers, of Clarksburg;

Clay D. Amos, Harry Shaw, A. Hale Watkins, Charles S. Hoult, William P. Lehman, Ward Lanham, Ernest R. Bell, Victor H. Shaw, Tusca Morris, and Treva Nutter, of Fairmont;

O. E. Wyckoff and Jed W. Robinson of Grafton;

Walter L. Brown, Amos A. Bolen, Jackson N. Huddleston, S. S. McNeer, J. B. Meek, J. H. Meek, Taylor Vinson, Harry Scherr, and C. W. Strickling, of Huntington;

Clarence E. Martin and J. O. Hen-son, of Martinsburg;

Ira E. Robinson, of Philippi;

D. J. F. Strother, Thornton G. Berry,
(Continued on page 279)

not so much in the law as concerning the law. They arise from the increasing influence of the law schools and the bar associations. The greater efficiency of modern law schools as compared with the old, the fact that today nearly all new members of the bar have come directly from the schools, the general acceptance of great legal texts written by the law professors, and the considerable effect upon the law of the numerous legal periodicals edited in the law schools, all testify to the significance of the first of these influences. The greater membership of the bar associations (all-inclusive membership in states having an incorporated bar), the tremendous range of bar association activities, particularly in the American Bar Association, and the great work of the American Law Institute and the Commissioners on Uniform State Laws, establish the importance of the associational influence. In the New York University volumes, both of these influences are dealt with interestingly.

A Fine Collection of Essays

These three volumes make a set that any lawyer would be proud to own. They constitute as fine a collection of essays on the immediate past and present of our law as is anywhere available. Issued in a limited edition of only 1000 numbered volumes, they will not be available to many, but those who secure copies will indeed be fortunate.

ROBERT A. LEFLAR,

Fayetteville, Ark.

A Century of Social Thought, by Judd, Moulton, and others. 1939. Durham, N. C.: Duke University Press. Pp. vi, 172.—This series of lectures, delivered by leading authorities at the centennial celebrations of Duke University, surveys the development of one hundred years in such subjects as education, economics, religion, science and belief, cultural trends, planning, and juristic thinking. No single definite impression emerges from the combined studies, apart from a general agreement on the obvious fact that the last hundred years have been a period of profound change. Professor Pound and Mr. Robert Moses draw the conclusion that despite all the changes there is nothing new under the sun. Professor Judd, however, seeks a new conception of general education to replace the classical tradition which he castigates; and Dr. Moulton would recast the assumptions of scarcity economics to suit the potential abundance of today.

Probably the reviewer's own attitude stands revealed when he expresses a preference for the lectures of Professor Pound and Mr. Moses over all the others. The schism between positive and natural law schools of jurisprudence is rightly traced back by Professor Pound to the conflict between the Socratics and the Cynics. Either the justness of law is due to its embodying permanent and universal principles of right, or it is the force and power of a superior authority which gives law its validity. Between these polar extremes is to be found a "line of unification," springing with Aristotle and meandering through the controversies of the present—a line which seeks to draw the permanent and the universal out of the particular and accidental, but which also allows room for enactments based on mere convention and usage.

On his own subject, Mr. Moses arrives at a somewhat similar middle position. Insistent on the need for planning before acting, he is nevertheless aware of the limitations imposed on a merely human foresight.

He is skeptical of master plans on too wide a scale, is dubious of extending governmental activities beyond our capacity to govern, and forthrightly critical of visionaries who look a hundred years ahead and forget the date of tomorrow. "Planning," he says, "is commonsense applied to limited objectives."

With Professor Judd's plea for a general education which will be general in its quality as well as in the numbers to whom it is offered, there can be little cavil. But in reacting against the aristocratic exclusiveness of the traditional secondary school curriculum, he ignores what is good in the study of classical culture. A modern democracy, even though it must equip its citizen voters for so changed a world, should not reject the virtues of the privileged class from which it is now politically emancipated. Professor Sorokin emphasizes the singleness of Euro-American culture, and asserts also that we see now the beginning of its decline. But the mere listing of roughly similar authors, artists, and thinkers in Europe and America is not enough to prove that it is a single culture which "pulsates similarly on both continents."

It is surprising that *A Century of Social Thought* omits a lecture on political theory and institutions. But perhaps that will be left for the next hundred years.

LESLIE LIPSON

University of New Zealand,
Wellington

A History of Criminal Syndicalism Legislation in the United States, by Eldridge Foster Dowell. (The Johns Hopkins University Studies in Historical and Political Science, Series LVII, No. 1). 1939. Baltimore: The Johns Hopkins Press. Pp. 146 (with appendices, table of cases, and indices).—Note that this scholarly monograph is not a history of criminal syndicalism, but is a history of legislation. The author declares that his work is "an effort to determine the forces and factors involved in the course of enacting, amending, or repealing, or attempting to enact, amend, or repeal such statutes." His investigation extends only through the year 1933, but subsequent legislation is noted in an appendix. Following the Introduction, there are chapters on: The I. W. W., Its Theories, Practices, and Portrayal by the Press; The Process of the Enactment of the Criminal Syndicalism Laws; Unsuccessful Efforts to Enact Criminal Syndicalism Laws; Attempts to Moderate or Repeal the Criminal Syndicalism Laws; and a very short Conclusion. Throughout the study Dr. Dowell is thorough and impartial in his dealing with a subject "impregnated with passion and prejudice." His references are copious. They include books, magazine articles, newspaper items, cases, statutes, and legislative records in great profusion. His style is plain and unemotional and as a result he probably gains in authority. Here is his thesis:

(a) Anti-radical legislation of some kind or other is now found in forty-two states. Most of this came from the period of "red hysteria" during and immediately after the World War. Much of the legislation of the period 1917-1920 was enacted to suppress the revolutionary industrial union, known as the Industrial Workers of the World—I. W. W. This group contemplated a class war. They believed that the exploitation of the workers would cease only when they had overthrown the entire wage system. But though believing in direct action the I. W. W. was not a violent organization. It used the strike, guerrilla warfare, and sabotage (in theory but not actually in practice), but never

fostered actual bloodshed. The newspapers, however, created a distorted and vicious picture of the I. W. W. It was associated with the Bolsheviks in the public mind, and an intolerant "public opinion" very hostile to the I. W. W. was moulded.

(b) Then came twenty-odd criminal syndicalism laws, designed to put a stop to the activities of radical groups, and passed with little debate or with oratory "characterized more by passion, prejudice, and misinformation than by a reasoned effort to get at the facts or a calm consideration of the issues involved."

(c) This type of legislation went farther than outlawing or restricting radical groups. It constituted a potential menace to the rights and activities of labor, to the civil liberties of the ordinary citizen, and to the free expression and circulation of certain doctrines and thought.

(d) This legislation was *class legislation*. The governors were identified with large business interests; employers' associations lobbied successfully; patriotic organizations were in their heyday; the farmers were hostile to the migratory, landless, homeless "Wobblies." And strange to say, even the labor groups failed in many instances to oppose such laws. The newspapers, supported by their advertising, really put the laws over. They fostered the bills, beat the war-drums, told half-truths, and controlled the votes. Headlines: "Kaiser's Coin Pays for I. W. W. Sabotage"; "The Kaiser credits Hearst, LaFollette, and the I. W. W.'s as the most representative Germans in America," etc.

(e) From 1920 through 1933 no criminal syndicalism law was enacted and only one effort to repeal such a law was successful (Arizona, 1927). The economic discontent and unrest of the depression resulted in numerous attempts to enact similar laws or to amend or repeal them. All failed except three small modifications.

(f) These 1917-20 laws were not necessary or desirable: (1) the normal criminal laws sufficiently covered actual acts of violence; (2) the laws went too far in that they made criminal the advocacy or suggestions of *doctrines* of violent change of the existing economic or political order. The hatred of radical groups caused the passage of these laws with their loose and ambiguous language and their drastic provisions; they sacrificed civil liberty to governmental control.

The author concludes: "Unless Americans are alert, they will find their civil liberties further curtailed, both by resort to such existing statutes as the criminal syndicalism laws and by the enactment of additional legislation of a similar nature." This is a timely suggestion and a timely study. If we go to war again it would be well to remember that our hysterical and intolerant attitude in 1917-20 produced a mass of legislation which has since been proved unnecessary and undesirable, but seemingly permanent. Dr. Dowell does a good job of proving his thesis, but he does little to drive his points home. Perhaps he knows that it would be impossible to do so?

NEWMAN F. BAKER

Northwestern University Law School

Liability for Animals: An Account of the Development and Present Law of Tortious Liability for Animals, Distress Damage Feasant, and the Duty to Fence, in Great Britain, Northern Ireland, and the Common-Law Dominions, by Granville L. Williams. 1939. Cambridge University Press. Pp. lxvi, 409.—The author of

this book tells us in his preface that he has set himself "the difficult task of satisfying both historian and practitioner." Whatever the difficulty, he has succeeded in both aims. This is a work of merit. It should be observed, however, that it is the British practitioner, not the American, that he has had in mind.

The law of distress damage feasant, with which the book begins, is most interesting. It goes very far back, back to the most primitive ideas, to the idea of vengeance, rather than of law. The instinct of the farmer whose garden is ravaged by a stray beast is to vent his wrath upon the beast, not upon its owner. The earliest conception is not to fix responsibility for negligence, but to punish the actual wrongdoer. In some ancient systems the landowner might kill the beast. The practice of distraining, to hold the animal as security for the recovery of damages from the owner, did not come in until later, as the law gained control of the situation. "The conscious, if unavowed, aim of the courts," Mr. Williams says, "has obviously been to attire in legal swaddling clothes an institution that started life in freedom." Some traces of its former breadth remain, as for example the extra-judicial nature of the proceeding, for which no order of court ever has been necessary. Nevertheless, as Mr. Williams says, "the history of distress damage feasant has for many centuries been a history of attenuation—almost of decay. A sweeping remedy, with examples of which our early reports teem, comes to play so small a part in modern life that its life-long companion, the village pound, virtually disappears from the face of the countryside." This, of course, is not to say that other remedies for the depredations of animals have had a like fate. In agricultural regions they have an important place; even in cities dogs still bite.

The author divides the treatment of his subject into six parts: distress damage feasant; the action of cattle trespass; the duty to fence; the action of nuisance in relation to liability for animals; the scienter action; animals and the highway. A preliminary summary gives the practitioner the salient rules pertinent to the subjects discussed under these six headings.

Mr. Williams writes in an animated and vigorous style, and his scholarly competence appears throughout. If not a work for the American practitioner, this is at any rate a work for the American law library, as a worthwhile contribution to the history of the common law.

The book is equipped with all desirable helps in the way of tables of cases, statutes, and indices. Indeed, there should be a word here for the publishers, who have produced a volume in every way worthy of the distinction of the author's text.

ARTHUR M. BROWN

Boston

The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering, by Lawrence A. Harper. 1939. New York: Columbia University Press. Pp. 503. The great significance of ships in determining the economic as well as political future of a government has been strongly impressed upon the minds of Americans during recent years. The enactment of the Merchant Marine Act, 1936, providing subsidies to encourage ship construction and the restrictions on ships contained in the Neutrality Act of 1939 are fresh in the minds of practically all members of the bar. The legislative experiments which have been tried by other governments are therefore of espe-

cial interest to persons engaged in governmental activities relating to ships.

It is believed that the comprehensive survey of the English navigation acts contained in this volume may be studied with profit as well as understanding by readers of the JOURNAL. The author, Lawrence A. Harper of the University of California, explains that his chief purpose is "to analyze the process of social engineering, as exemplified by the Navigation Acts, in the hope that it may throw some light upon the problems involved in our present social experiments."

The author discusses at the outset the legislative history of the English navigation laws which were revised and enacted in comprehensive terms in the Act of Parliament of 1651. The competition of British merchants with Dutch, French, and Italian merchants is set forth as the economic basis of the legislation, whereas the political basis is stated to have been the need of the British Navy for trained seamen and auxiliary ships which might be used in time of war. It is pointed out that the granting of a subsidy or bounty to encourage ship-builders "probably commenced in the middle of the fifteenth century, with the grant to John Tavener of Hull when he built the 'Grace Dieu,' a ship of tremendous size for that age." There had been legislation requiring that all British merchants must trade "only in English bottoms." In 1651 this was modified so that little attention was paid to exportations, and emphasis was placed upon importations. The act "proclaimed the doctrine that merchandise should be brought directly from the country of production or from the port where usually first shipped, and announced that goods must be carried either in ships of the country of origin or of usual first shipment or in English ships."

The prohibitions on colonial trade with foreigners are reviewed and the difficulties in enforcement of these laws are described in an interesting way, as well as the jealousies which arose between the merchants of different localities and the discriminations which resulted. Probably the most interesting chapters for lawyers are those entitled "The Law at the Waterside"; "The Human Factor"; "Colonial Courts"; and "The Difficulties of Remote Control."

The volume contains numerous footnotes and references of value, as well as a bibliography, list of statutes cited, and a complete index.

WILLIAM R. VALLANCE

Washington, D. C.

Social Change and Labor Law, by Malcolm Sharp and Charles O. Gregory. 1939. University of Chicago Press. Pp. vii, 175.—There is an old saying among English businessmen that the least safe ship to sail in is a partnership. It applies with equal force when two scholars attempt to write one book. Even when both agree on their general point of view, the division of labor is seldom equally advantageous to each. In this book, of which the first half is written by Professor Sharp and the second by Professor Gregory, the unifying theme is the liberal philosophy which both hold. In their study of law, both are concerned with legal dynamics rather than legal statics. But the subject matter is not perfectly apportioned between them. Professor Sharp's section contains three chapters under the broad title "Society and the Law," whilst Professor Gregory deals in another three with the more limited topic "Government Control of Labor"

(Continued on page 271)

ARRANGEMENTS FOR ANNUAL MEETING, PHILADELPHIA, PENNSYLVANIA, SEPTEMBER 9-13, 1940

Headquarters—Bellevue-Stratford Hotel

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin beds for 2 persons	Parlor suites (2 rooms for 1 or 2 pers.)
Adelphia (13th & Chestnut)	\$3.50-5.00	\$5.00-6.00	\$6.00- 8.00	\$12.00-25.00
Barclay (18th & Ritten- house Sq. E.)		6.00	7.00-10.00	12.00-18.00
Bellevue-Stratford (Broad & Walnut)	All space exhausted.			
Benjamin Franklin (9th & Chestnut)	3.50-5.00	5.00-6.00	6.00- 8.00	12.00-14.00
Drake (1512 Spruce St.)	3.50	5.50	6.00	10.00
Essex (13th & Filbert)	3.00-3.50	5.00-6.00	7.00	
McAlpin (19th & Chestnut)	2.25-2.75	4.00	4.50- 5.00	
Majestic (Broad & Girard)	2.50-3.00	4.00-5.00	5.00	8.00-12.00
Philadelphian (39th & Chestnut)	3.00-4.00	5.00-5.50	6.00- 8.00	9.00-20.00
Ritz-Carlton (Broad & Walnut)				10.00-12.00
St. James (13th & Walnut)	3.00		5.00- 6.00	
Stephen Girard .. (2027 Chestnut St.)	2.75-3.25	4.50-5.50	5.50	
Sylvania (13th & Locust)	3.00	6.00	6.00	10.00-12.00
Walton (Broad & Locust)	2.50-4.00	4.00-5.00	5.00- 6.00	8.00-12.00
Warburton (20th & Sansom)	3.00		5.00	
Warwick (17th & Locust)	4.50-5.50		7.00- 8.00	12.00-14.50
Wellington (19th & Walnut)	4.00		6.00	8.00

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice** of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

Disputes." The result is that Dr. Sharp's subject is too general to be adequately treated and his discussion ranges over the broad problems of responsibility, contract, freedom of speech, corporate personality, and economic strife. What he has to say on each topic is excellent, but he does not sufficiently interrelate the parts; and his three chapters become a series of points, rather than a connected straight line. Dr. Gregory, however, within the confines of available space, is able to give a clear and well-drawn picture of his single theme—the common law in State and Federal Courts, State and Federal legislation up till 1932, and State and Federal legislation after 1932. The historical evolution of judicial attitudes and legislative enactments is skillfully and objectively described.

Despite this defect in its plan, this book contains much that is of value and illustrates the modern difficulty of applying the law to the swiftly changing facts. Professor Sharp's discussion ably reveals the inadequacy of certain traditional legal concepts and the need to modify them today; whilst Professor Gregory gives a specific example in his story of labor's fight for legal recognition. The book should be read by all who are anxious to provide a means of judicializing economic tensions.

LESLIE LIPSON

University of New Zealand,
Wellington

Federal Rules Service, edited by James A. Pike and Henry G. Fischer. 1939. Chicago: Callaghan and Company. (A weekly loose-leaf service with permanent volumes on the new Federal Rules of Civil Procedure.)—The chief value of this service is to furnish to the bar generally the Department of Justice practice case reports now issued to a limited group. There is some supplementary material, such as a digest of law review articles and local rules of all the districts. The accumulation of local rules may fill a want for lawyers who practice in many districts; otherwise, they are likely simply to add to bulk, expense and installment service nuisance. The rules of one's own district are ordinarily more readily accessible through other means.

Classifications, tables of cases, indices and cross-indices will doubtless be a help when the labyrinthine system is once mastered.

HARRY N. GOTTLIEB

Chicago

The Legislative Background of the Fair Labor Standards Act, by Orme Wheelock Phelps. (Studies in Business Administration, School of Business, University of Chicago, Vol. 9, No. 3). 1939. Pp. ix, 71.—Orme Wheelock Phelps, a research fellow in the School of Business at the University of Chicago, has undertaken to contrast the Fair Labor Standards Act with all earlier federal and state statutes regulating wages, hours, and child labor. Recognizing that the Act is a legislative expression of a continuously growing national sentiment in favor of such regulation, the author says that the purpose of his study is to answer the following questions: What were the standards of the earlier statutes? How do they compare with the standards of the Fair Labor Standards Act? To what extent does the new statute merely restate or extend the old standards and to what extent does it constitute wholly new regulation? The author's thesis, which is not startlingly new, is that if the new statute is a re-statement or a moderate extension of old statutes, it stands a better chance of acceptance from business



Harris & Ewing

HON. JOSEPH W. MADDEN

Chairman, National Labor Relations Board

men and from courts than if it is a totally new departure.

By careful comparison, the author concludes that the Fair Labor Standards Act is substantially a re-enactment of the wage, hour and child labor provisions of the defunct National Industrial Recovery Act. Then, starting with Van Buren's order of 1840 limiting the hours of labor on public works, the author examines all other federal and state regulations and concludes that the Fair Labor Standards Act has the following relationship to legislation in force in 1938:

a. As to child labor, it does not go far beyond the child labor legislation of most of the states.

b. As to maximum working hours, it is a "considerable advance" over previous state and federal legislation, because it fixes a lower maximum and applies generally. On this count, the Act invites "avoidance on the part either of courts, of administrative officials, or of business men."

c. As to minimum wages, it is a "variation from type" as against all earlier legislation except the N.I.R.A., because its minimum wage is irreducible and its application is general. The variation, says the author, "does not seem particularly fortunate." On this count, the policy change is so great that it will "invite constitutional disability."

The book is a convenient guide to earlier regulatory statutes. Nevertheless, the author contributes little to legal thinking when he declares that unconstitutionality is visited upon statutes which embody a great change of policy. The statutes creating the Federal Trade Commission and the National Labor Relations Board embodied great policy changes and survived the Supreme Court's scrutiny. Subjected to the author's

tests, these statutes would have been held unconstitutional. The reader of the book must bear in mind the obvious: namely, that there are additional factors favoring constitutionality which may be more important than the exact degree to which a statute changes established policy. As a carefully prepared, concise handbook, however, the book is of value to any lawyer interested for academic or practical purposes in making an exhaustive study of the Fair Labor Standards Act.

LEON M. DESPRES

Chicago

Price Control Under Fair Trade Legislation, by Ewald T. Grether. 1939. New York: Oxford University Press. Pp. x, 517.—Most members of the legal profession may never have occasion to advise a client or participate in a case in connection with the laws permitting resale price control of trade-marked goods; that some members of the profession will have such occasion is assured by the action of the legislatures of nearly every state in placing some form of "fair trade" statute on the books in the past few years. Passed for the most part hurriedly—ten states copied serious typo-

graphical errors in the pioneer California law—these statutes involve a field in which interpretation and enforcement are certain to prove challenging.

In the volume under review there is much legal interpretation and many references to judicial and administrative law. The appendix contains a comprehensive summary of the general price control statutes of the various states. The book is nevertheless essentially an economic evaluation. The first 200 pages are largely descriptive of the setting and experience with the California law; in the latter two-thirds of this portion much that is commonplace is so provincially presented that it constitutes a rather formidable obstacle separating the reader from the more valuable interpretative and deductive portion of the book. To those expressly concerned with the particular type of legislation the book may be recommended as a competent and useful study; for the many others and especially the larger audience concerned with public policy, it is regrettable that a really excellent chapter on the interrelations of law, economics, and trade regulation is so effectively insulated.

WILLIAM H. MOORE

Washington, D. C.

TO MEMBERS OF THE AMERICAN BAR ASSOCIATION:

The scope of the work of the American Bar Association has greatly increased during the past ten years. In order to continue to carry on the worthwhile activities that have been undertaken, and to take on new activities from time to time, as it should, the Association's membership must be correspondingly increased.

Every member of the Association undoubtedly knows at least one lawyer who is eligible for membership. An application form is printed below for your convenience in obtaining a new member for the Association. Applications presented between January 1 and March 30 should be accompanied by check for \$4.00 (\$2.00 if the applicant has been admitted to the bar less than five years) covering dues for the remainder of the fiscal year ending June 30, 1940.

Application for Membership
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Leading Articles in Current Legal Periodicals

BY KENNETH C. SEARS

Professor of Law, University of Chicago

CONSTITUTIONAL LAW

James Madison and Judicial Review, by C. Perry Patterson, in 28 California L. Rev. 22 (Nov., 1939).

"According to Madison, who knew the intention of the Convention better than any other member, judicial review was intentionally and deliberately granted to the courts in specific clauses of the Constitution." Thus is support given to Beard and denied to Corwin. The strongest arguments are: (1) that it was assumed by Gerry, Luther Martin, and Mason in the argument over a Council of Revision that judges in their capacity as judges would decide on the constitutionality of statutes; (2) that Madison in the debate on the ex post facto provision assumed that judicial review of statutes would occur; and (3) that Madison in arguing for ratification by conventions stated: "A law violating a constitution established by the people themselves would be considered by the judges as null and void." Other conclusions of the author seem to rest on unsatisfactory evidence. Particularly so is the conclusion that Madison thought that "the Convention deliberately provided for judicial review by a definite grant expressed in the clauses of the Constitution and that it understood that the language used in these clauses expressly granted this power to the judicial department."

LEGAL PHILOSOPHY

Cardozo's Philosophy of Law, by Edwin W. Patterson, in 88 U. of Pennsylvania L. Rev. 71 (Nov., 1939).

Those interested in the more erudite aspects of law should enjoy this first of two articles by Professor Patterson. It is well written about the views of one who seems destined to be regarded for some time, at least, as one of the greatest products of American jurisprudence. The present article confines itself, in the main, to Cardozo's conception of law. His conception can be briefly stated thus: (1) law is "the body of rules and principles which a court will probably recognize as authoritative in making its decision"; (2) a law is a positive law, "sanctioned by the force of the state"; (3) "a law is a generalization which goes beyond the particular case" . . . ; (4) law is not "merely what courts do in fact"; (5) but "the judge is the center of the juristic universe"; (6) the body of the law is "a set of propositions built up from judicial decisions" rather than "a set deduced from higher and more inclusive generalizations which were derived *a priori*"; and finally (7) the law of nature is not something that is eternal, overriding human law, but "stuff out of which human or positive law is to be woven, when other sources fail."

NUISANCES

Unaesthetic Sights as Nuisances, by Dix W. Noel, in 25 Cornell Law Quart. 1 (Dec., 1939).

Zoning and building restrictions are not always available. When they are not, will the common law of nuisances protect one from unaesthetic sights? "In the development of the law of nuisances aesthetic interests usually have been treated with slight regard, as a matter of luxury and indulgence." But a recent West Virginia opinion indicates by its language that an eyesore,



THE LATE JUSTICE BENJAMIN N. CARDOZO

a landscape blight, may attain sufficient significance to warrant equitable interposition. A development is predicted in the direction of protecting persons from objectionable views of junk yards, automobile "graveyards," large signs, mausoleums, tanks, etc. There will be a difficulty in establishing an objective standard but this is not an insuperable objection. Noises and odors may constitute nuisances. Courts of last resort have not yet found automobile wrecking establishments to be nuisances on account of unsightliness alone, but they have enjoined funeral homes because they present a constant reminder of death.

SECURITIES

Trading in Securities by Directors, Officers and Stockholders: Section 16 of The Securities Exchange Act, by Kenneth L. Yourd, in 38 Michigan Law Rev. 133 (Dec., 1939).

Section 16 is not set forth, even though it is the basis of the discussion. The intent of the section is to prevent the officer, director, and substantial stockholder from speculating with the "equity" securities of his company on the basis of "inside" information. To prevent this, burdens of the section apply to all "insiders," good actors as well as bad actors. The sanctions are three: criminal, civil, and publicity. The act is limited to concerns with "equity" securities registered on a national securities exchange. Thus, "section 16 (a) adds to the statutory mandate that all must be told

about the security, the further mandate that all must be told about what the corporate insiders are doing with the security." If this is not sufficient, then section 16 (b) extracts the profit from a purchase and sale, or a sale and purchase, by the mentioned persons within any period of less than six months. This extraction is for the benefit of the issuer of the security. This statutory liability, where applicable, goes much beyond the case-made law, which furthermore is not harmonious. However, if the transaction is not completed within the six months period there is no action under section 16 (b). Section 16 (c) subjects the specified persons to criminal liability if they sell a security not owned, or, if owned, they fail to deliver it within twenty days. Thus are prohibited "short sales" and "sales against the box." Section 16 (d) prohibits an arbitrage transaction in an "equity" security by an officer or director unless he reports the transaction and accounts for the profits. All provisions in section 16 seem desirable except 16 (b). As to the latter, the practically unanimous opinion of the "enlightened, intelligent leaders in the financial world" is in favor of its repeal.

U. S. SUPREME COURT

The Supreme Court: 1938 Term, by James Wm. Moore and Shirley Adelson, in 26 Virginia Law Rev. 1 (Nov., 1939).

Sixty-nine pages of interesting comment reviews decisions of the United States Supreme Court during the past six terms, 1933 to 1938 inclusive. Pessimistic comments by Mr. Justice Story many years ago and by Frank Hogan last summer form the introduction to a general survey that is good to read in order to obtain perspective. "The never-ending struggle continues over where state power ends and federal power begins; over questions as to when state or federal power has been abused. These inevitable facts are not in themselves alarming unless life in our democracy is itself alarming." . . . But "there are no sign posts pointing to Moscow."

TAXATION

Death and Taxes Are Certain—But What of Domicile?, by Harrison Tweed and Christopher S. Sargent, in 53 Harvard Law Rev. 68 (Nov., 1939).

The historic rule permitted multiple succession taxation by the state of the domicile and by any other state the law of which contributed in effecting the transfer. Then a reversal set in. First, it was with tangibles. Then a broad declaration indicated to some that the latter rule would be extended to intangibles. Recently, the Supreme Court has ruled that there is no constitutional prohibition against multiple succession taxation of intangibles. That court's "split in *Curry v. McCannless* and *Graves v. Elliott*, was not whether the securities could be taxed at the situs of the trust, but whether, being admittedly taxable there, they were also subject to taxation at the domicile of the creator of the trust." Thus the problem of multiple domicile becomes important. The uncertainty and injustice thus created has been and can be reduced by: (1) the enactment of reciprocal state statutes whereby a state does not tax the intangibles of a decedent domiciled in another state which has a similar statute; (2) possibly by the passage by Congress of an act permitting the estate to sue the contesting states in the District of Columbia with the states passing reciprocal laws consenting in ad-

vance to this suit; and (3) the clarification of the law of domicile. The latter idea involves the rejection of certain misconceptions and exaggerations. Prominent among these are the beliefs that domicile is mainly a matter of intention of the particular person and that there can be no acquisition of a new domicile until the old one has been abandoned. Furthermore it is urged that the state and the individual should cooperate to secure an adjudication during the life of a taxpayer as to his domicile in that state. This plan has the advantage of obtaining the taxpayer's testimony and thus makes the investigation less elaborate and expensive. But there is "no single, immediate and complete remedy" for multiple taxation.

TRADE REGULATION

The Sherman Act and Labor Disputes: I, by Louis B. Boudin in 39 Columbia Law Rev. 1283 (Dec., 1939).

The Apex Hosiery case and the recent activity by the Department of Justice against alleged violators of the anti-trust laws apparently stimulated this extensive dissertation of fifty-five pages, which is the first installment only. The thesis is that the evidence conclusively shows that labor organizations were not intended to be included within the purview of the Sherman Act; that all of the labor cases have been characterized by the poor quality of the arguments on behalf of labor organizations and by the poor quality of the court opinions; that the *Danbury Hatters'* case was based upon no definite theory whatever; that "nothing that was not prohibited at common law is prohibited by the Sherman Act"; but that the Rule of Reason of the *Standard Oil and Tobacco cases* makes wrongful under the Sherman Act whatever is considered wrongful by the general law, "i. e., the combined common law of this country and England—as the same may be established from time to time by the courts." The style is lucid and the reading is interesting. This is an accomplishment, because the subject-matter is not exciting. But it is feared that the author displays a weakness for certain conclusions that are not well supported by the facts which he sets forth. Is he another victim of wishful thinking?

TRADE REGULATION

The Anti-Trust Prosecution Against the American Medical Association, by Benjamin D. Raub, Jr., in 6 Law and Contemporary Problems, 595 (Autumn, 1939).

The prosecution was under section three of the Sherman Act for engaging in a conspiracy in restraint of trade in the District of Columbia. The author's purpose was to outline impartially the question of law presented to the District Court and the points decided by the court. This purpose appears to have been accomplished. Most interesting perhaps is the government's argument that there is a difference between section one, necessarily limited to interstate commerce, and section three, "which applies to the District of Columbia, where Congress has full police power." Thus, it was argued, the phrase "trade and commerce," which appears in both sections, means different things. Upon this premise the government was able to cite a surprising amount of authority that the practice of medicine is a trade but it was not sufficient to convince Judge Proctor, who sustained the demurrer to the indictment.

Comments—Letters

EDITOR OF AMERICAN BAR ASSOCIATION JOURNAL:

I READ with interest your editorial comment in the February issue of the JOURNAL relating to the action of the House of Delegates on the resolution of the Council of Criminal Law recommending the endorsement of the Association to extend the scope of the present federal criminal laws to fraudulent practices in elections where federal officers are nominated or elected or where national questions are voted upon. You interpret the action of the House in referring the report back to the Section of Criminal Law as an incident which "showed how alert and vigilant is the House of Delegates in its opposition to unneeded extension of Federal powers into the affairs of States and cities."

Your observations are ambiguous in that it is unclear if you intend to say that the legislation recommended by the Council is unneeded, or if you merely recognize the wariness of the House in fully examining any problem which has to do with the extension of federal powers.

Editorial Criticized

I assume the first construction is the one intended by you. If so, you do small credit to the vote of those Delegates who were in favor of the resolution, in view of the fact that it was not lost but merely sent back to the Section for action by it by the narrow vote of 57 to 50. While the resolution offered had the approval of the Criminal Law Council, it had not been presented to the entire Section. It is probable it was referred back to the Section for that reason.

In the report of the Committee on Federal Election Laws made to the Section at the last general meeting of the Association in San Francisco, it was pointed out that under the present state of the federal law there could be a national conspiracy formed and carried out to fraudulently elect the President and Vice-President of the United States without the violation of any federal law. It was further observed that there was no federal law to reach fraud and corruption in the nomination or selection of United States Senators and Representatives for Congress. Our Committee was charged with the duty of preparing a proposed bill to insure to United States citizens, as far as possible, that elections in which national officers or national questions were to be voted upon should be honestly conducted.

Pursuant to this charge, our Committee prepared such a proposed bill after much thought and careful study. There is no indication from your editorial remarks that you have seen the draft or have given it your considered analysis. Perhaps in the rush to prepare your editorial you did not have the opportunity to examine the draft or determine its contents or purpose or the necessity for this character of legislation. In order that it may have your considered judgment, I am enclosing a copy of the proposed bill.

Federal Law Needed

It is not a matter of common knowledge, even among members of the Bar, that the only federal law on the subject of election frauds except the narrow provisions of the Corrupt Practices Act (2 U. S. C. A., par. 241-254) and the Hatch Act (U. S. C., Current Service 1939, No. 10, p. 1242-1244), is section 19 of the

Criminal Code (18 U. S. C. A., par. 51), a conspiracy section, which, among other things, makes it a federal offense if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.

It was under this section that the Kansas City prosecutions were based. (Walker v. United States, 93 Fed. (2d) 383, and other opinions in the same volume.) It was held in the Walker case that a conspiracy to fraudulently select presidential electors at an election does not come within the purview of the present federal statute. Furthermore, it is our considered judgment that fraudulent conspiracies at primary elections to select nominees for the office of United States Senators and Members of Congress are without the orbit of present federal law.

The report of our Committee and the draft of the proposed bill were submitted, among others, to United States Judges Merrill E. Otis and Albert L. Reeves, of the Western District of Missouri. They are the judges who presided at the Kansas City cases, and are acutely aware of the federal law on the subject and its deficiencies.

Judge Reeves writes:

"It is my opinion that your bill quite admirably covers all of the matters desired to be included in a good election law. This bill should be passed by the Congress."

Views of Judge Otis

Judge Otis writes:

"I have carefully considered the proposed bill prepared by your committee (. . .) to enforce the rights of citizens of the United States in the nomination and election of senators, representatives and presidential electors. I am decidedly in favor of the adoption of this bill as law. The federal judges in Kansas City have had perhaps more intimate experience with attempts to defeat the rights of citizens in elections than have any other judges in the country. The present laws are certainly inadequate to protect the rights of citizens. Under the present laws great things have been accomplished here in Kansas City, but the difficulties have been apparent and the narrow field in which it is possible for the Department of Justice to operate has been especially apparent. It is difficult to conceive of any reason why there should not be jurisdiction in the federal courts to protect the rights of all citizens in all elections in which federal officials are nominated or chosen for public office."

Copies of the letters of these experienced and eminent authorities on the subject are enclosed herewith.

Judge John B. Sanborn of the United States Circuit Court of Appeals for the Eighth Circuit wrote the major opinions in the Kansas City cases. He is a member of this Committee, and he actively assisted in the preparation of the proposed bill. He has approved the views and work of the Committee.

To Promote Honest Federal Elections

We recognize that some men can honestly believe that the proposed legislation is unnecessary or inadvisable and that it might result in unseemly conflicts between State authorities and Federal authorities. But

we do not believe that there would be any such result.

We strongly advocate honest elections and all reasonable legislation which will make them so. The proposed legislation changes no present State law; it adds no new duty or additional burden upon election officials. It merely provides that it shall be a federal offense if such elections are dishonestly conducted where they affect the vote upon a national officer or national question.

We appreciate your interest in this subject; but because of the ambiguous phraseology of your editorial, some members of the Association may be confused as to the merit of the proposed legislation on the subject. We conceived it our duty to prepare a proposal to meet what we believe is a desperate national need. It is not incumbent upon us to pass upon the popularity or unpopularity of such legislation. It is obvious to us, however, that if vote stealing and fraudulent practices at federal elections continue to spread, the last hope of a democracy has failed.

ARTHUR J. FREUND

St. Louis, Missouri; Chairman, Federal Elections Law Committee.

Re Section of Patent, Trade-Mark and Copyright Law

On page 111 of your JOURNAL for February, 1940, your two references to my name are each incorrect and misleading, because you fail to state that I also reported to the House of Delegates our Section's subsequent referendum vote adverse to the bill. After making the statement which you quote, I said (transcript pages 154-5):

"Within the last few weeks, by direction of our Section Council, we took a Section referendum on some Temporary National Economic Committee recommendations that came out, I think, on the same day that you met in San Francisco last summer, so they could not have been acted upon last summer. One of these recommendations was for this single court of patent appeals.

"So we took this referendum of our Section. We did not have a Section meeting. Between 500 and 600 votes were turned in by mail to our Section Secretary. He reported to the Executive Secretary.

"On the question of a proposed court of patent appeals, with or without the qualifications for judges that we tried to insist on last summer, our section referendum shows 217 for such a court and 323 against such a court.

"PRESIDENT BEARDSLEY: The section, then, voted in accord with the recommendation of the Committee on Jurisprudence and Law Reform?

"MR. HAYNES: Yes, sir."

I was not arguing either for or against the bill, but was merely describing the nature of the proposed court, and the favorable vote and subsequent unfavorable referendum vote by our Section on the subject. You omitted my reference to the second vote.

In the interest of accuracy, I will appreciate it if you will publish this letter, or an adequate abstract thereof, in the next issue of the JOURNAL.

DELOS G. HAYNES
Chairman of Section.

St. Louis

I WISH to comment on the article by Colonel O. R. McGuire, Chairman of the American Bar Association Committee on Administrative Law, appearing in the February 1940 issue of the Association Journal on the subject of the Federal Administrative Law Bill. This article, in common with other statements in behalf of the Administrative Law Bill, tends to give a wrong impression in respect of the bill and as to the nature of the opposition to the bill.

I desire to call attention to the following:

1. It is stated in this article that hearings had been held in April and May, 1938, by the Subcommittee of the Senate Judiciary Committee and that it was concluded that no further hearings were necessary. It is not stated, however, that the hearings held in April and May 1938 were on a totally different bill.

2. It is made to appear that the only opposition to the bill before the House Subcommittee was on the part of "a number of subordinate officers and employees of the various administrative agencies" and of one "Liberal" legal organization.

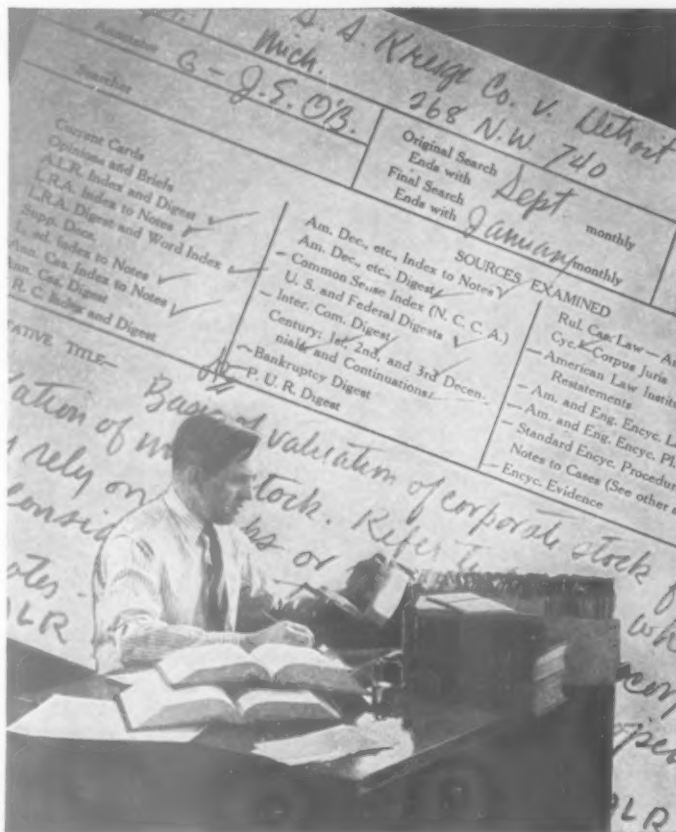
As a matter of fact appearances in opposition to the bill were made among others by the General Counsel of the Securities and Exchange Commission, the Solicitor for the Department of Commerce and the Head Attorney for the Department of Agriculture. Furthermore, there were filed with the Subcommittee briefs and statements in opposition by the Federal Trade Commission, Department of the Interior, Department of Agriculture, Department of Justice, Department of War, Treasury Department, Federal Communications Commission, Federal Power Commission and Veterans' Administration. In addition there was filed an analysis of the bill by F. F. Blachly of the Brookings Institution containing the comment: "A detailed examination shows that many of the provisions of this bill are in opposition to principles of constitutional law as developed by the courts, to the whole system of administrative law that Congress and the courts have been developing for over a century, and are incompatible with sound administrative action."

While an appearance was made in opposition to the bill by the Secretary of the National Lawyers Guild, presumably the "Liberal" legal organization referred to, it also appears that the Committees on Administrative Law and on Federal legislation of the Association of the Bar of the City of New York submitted a joint report disapproving the bill.

3. Colonel McGuire's article states that the charge that the bill would "hamstring" business and labor is belied by the endorsements of both great labor and great business organizations. I know of no serious charge that the bill would "hamstring" business and labor. The charge that is made is that the bill would "hamstring" the Federal administrative agencies. On this ground the bill is opposed by a number of thoughtful lawyers who are fully conscious of the need for reform of Federal administrative procedure.

4. It is stated that the bill is so simple that its proposal to "govern the governors" and to "regulate the regulators" is easily understood. A careful study of the bill will not substantiate this. In fact there are certain sections of the bill which I defy anyone to explain.

THE ANNOTATOR



Actual photograph of an American Law Report editor at his desk. In the background is an enlargement of the so-called A.L.R. search card which helps organize his search.

The Lawyer Profits By His Efforts

He has a complete library. ✧ He makes your entire search. ✧ He provides certainty of exhaustive and thorough coverage. ✧ He furnishes you a pre-prepared brief. ✧ He helps you avoid the drudgery of search. ✧ ✧

AMERICAN LAW REPORTS ANNOTATED

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I have given careful consideration to the provisions of this bill not only as a member of the Committee on Administrative Law of the Association of the Bar of the City of New York, but also in connection with an article which I have written on the subject, appearing in the January 1940 issue of the Louisiana Law Review. I have reached the conclusion that the Administrative Law Bill is vitally defective, poorly drafted and impossible in its application to many of the situations which are embraced within its scope. There is no evidence of any adequate consideration having been given to the detailed application of this legislation and of its effect on the operation of the many agencies to be affected thereby. It is based on an *a priori* approach to a problem that can be dealt with adequately only after a careful study of the actual working of the administrative agencies whose functioning it attempts to regulate.

Please understand, I am in thorough agreement that there are serious abuses in the practice and procedure of Federal administrative agencies which call for reform. My objection is to the particular bill in question, which I believe to be thoroughly unworkable.

ALFRED JARETZKI, JR.

New York City.

I have just read the article on the RIGHT OF JUDICIARY TO PUNISH CONTEMPT BY PUBLICATION by Harry Graham Balter of the Los Angeles Bar in your issue of February, 1940. In Maryland, we have no difficulty about these matters.

1. Our statute, Article 5, section 101, provides: (a) An orderly procedure in contempt matters, and (b) an appeal to our Court of Appeals, which latter court has the power to pass upon the law and the facts, making such order as that court may think proper, "including the right to reverse or modify the order appealed from." With us, therefore, the power is not "uncontrolled."

2. The question of whether or not an indirect contempt has a reasonable tendency to interfere with the orderly administration of justice in a pending case is, of necessity, a legal question, and so not proper for consideration by a jury. The facts in such cases are usually not in dispute as in the Bridges case referred to in Mr. Balter's article.

3. The determination of such a question arising in a State court is one for the judiciary of the particular State, and so, of course, the Supreme Court of the United States is without jurisdiction.

May I add that I am a very strong believer in the jury system, but in my judgment the suggestion of a jury trial in contempt cases is absurd.

WALTER H. BUCK.

Baltimore.

In a review of Quindry, *Practicing Law: When, Where and How*, appearing in the January number of the JOURNAL at page 33, it was said that Mr. Quindry's statement that the New York Supplement "reports all of the decisions of the New York Court of Appeals from its beginning," is incorrect. It has since been called to the reviewer's attention that there is published an edition of the New York Supplement, primarily for the New York trade, concerning which Mr. Quindry's statement is correct.

A QUATRAIN IN SEARCH OF AN AUTHOR

(From the New York Sun)

One of The Sun's intelligently curious readers put to us the other day this question:

Do you happen to know whether the verses

"They do not write in verse or prose;
They simply lay their words in rows.
The self-same words that Webster penned
They merely lay them end to end."

published in your editorial article on the verbosity of judges' decisions were a divine inspiration of the president of the American Bar Association or whether he scooped them from some masterpiece of which I have no knowledge?

So eminent in all arts and sciences, including sandlot baseball, is the author of this inquiry that The Sun felt no compunction in confessing to him that it shared his ignorance of the origin of the admirable quatrain, and pledged itself to try to find out whence it came. President Beardsley of the American Bar Association could not give its source; he heard it first in private conversation with Judge Victor E. Shaw of the Supreme Court of California, who is now in private practice in Los Angeles. Judge Shaw does not know where it came from; some thirty years ago in a publication whose name was not impressed upon his memory he came across the lines, whether as a quotation or an original contribution he does not recall.

Here we shall interpolate a hitherto undisclosed secret, not derived from Judge Shaw, but from authorities whose identities we shall conceal, of the bench of which Judge Shaw was a member: On it sat two juriconsults of grave demeanor, incorruptible integrity and deep learning, who had but one weakness. That weakness was an undue attachment to words for words' sake. In Judge Shaw's comments on the opinions elucidating the inevitably correct decisions of these eminent men, and in his conversations with them, the lines under scrutiny, delivered orally or in writing, occasionally found place, to be effaced, obliterated, erased, rased, expunged, canceled, stricken out, in short, deleted, before the opinions reached the printer's case. Ah, that we might have more of the unrecorded history of those judicial conferences from which the public is sedulously—and it may be, wisely—excluded!

Bar and bench having proved unfruitful, appeal was taken to Miss Louella D. Everett, the final resort of baffled seekers for attributions and sources. Even that fountain of knowledge, that astounding memory, can be of but little help. Miss Everett records that Don Marquis once wrote a three-stanza poem "On the Ease of Column Writing" in which he gave credit to one of his worthy predecessors on the Staff of this newspaper for the words he used, explaining: "I merely range them in a row, Webster's done the work, you know! . . . I merely lay them end to end!" This does not satisfy Miss Everett. She thinks that if the quatrain originated on the Pacific Slope, Stoddard King of Spokane, whose writings were much quoted, may have written it, and she adds that it sounds as if it "had been written at the time imagist and free verse irked so many poetry lovers."

There, at present, the quest pauses; if any of The Sun's unequaled Phalanx of Quotation Mongers knows the source of the quatrain, we shall be glad to carry it to a conclusion, but we warn all of them now that in exposition of this topic not even the remotest approach to prolixity will be tolerated for an instant—this out of respect to the verses themselves.

Nominating Petitions

(Continued from page 267)

Jr., B. F. Howard, W. H. Ballard, M. D. Herzbrun, Zeb H. Herndon and Samuel Solins, of Welch;

Kent B. Hall, Russell B. Goodwin, William C. Piper, G. Alan Garden, Joseph R. Curl, John C. Palmer, Jr., John R. Koller, Wright Hugus, Henry S. Schrader, Charles J. Schuck, C. Lee Spillers, J. J. P. O'Brien, Robert J. Riley, of Wheeling.

The same persons named herein, and Tom B. Foulk, Frank W. Nesbitt and Russell G. Nesbitt of Wheeling, also nominate Frank C. Haymond for the office of State Delegate for and from West Virginia, for the vacancy now existing in the term to expire at the adjournment of the 1940 Annual Meeting.

WISCONSIN

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Otto A. Oestreich, Janesville, Wisconsin, for the office of State Delegate for and from the State of Wisconsin, for the unexpired term of Carl B. Rix, resigned, to end at the adjournment of 1941 Annual Meeting:

Geo. A. Garrigan, George W. Keithley, W. H. Arnold, H. W. Adams, George Carey, of Beloit.

P. J. E. Wood, Roger G. Cunningham, Sidney J. Thronson, Stanley M. Ryan, Robert J. Cunningham, Paul N. Grubb, Thomas Nolan, W. H. Dougherty, Bernard M. Palmer, of Janesville.

Edward T. Fairchild, M. B. Rosenberry, J. D. Wickhem, Geo. B. Nelson, Gilson G. Glasier, E. L. Wingert, Byron H. Stebbins, R. M. Rieser, Carl N. Hill, Arthur A. McLeod, Chauncey E. Blake, William Ryan, Oscar T. Toebaas, E. E. Brossard, John S. Cavanaugh, Mortimer Levitan, of Madison.

Maxwell H. Herriott, William Doll, Carl B. Rix, Benjamin Poss, H. E. Toelle, G. Carl Kuelthau, Reginald I. Kenney, Clark M. Robertson, Fraley N. Weidner, Howard R. Johnson, H. M. Knoeller, Charles W. Reeder, Perry J. Stearns, Geo. E. Ballhorn, John P. Koehler, Jr., Leon E. Kaumheimer, J. H. Marshutz, of Milwaukee.

Virginia Conference on Bar Examinations

AS the guests of the College of William and Mary, the Virginia Board of Law Examiners and representatives from the four Virginia law school faculties met at Williamsburg, Virginia, on Dec. 14. The business session, which lasted about three hours, was devoted primarily to a consideration of the bar examination given in Richmond on Dec. 12 and 13.



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An appointment with the lawyer selected will be made at once, if possible. The prospective client will be given a card from the Chicago Bar Association to present at the lawyer's office and will pay the lawyer \$3.00 in advance. This will entitle the client to a half hour's consultation; or he may have an hour's service for \$5.00. The client will be entitled to confer with the lawyer himself—not with his clerk or his partner. The client will be the client of the lawyer and not of anyone else nor of the Chicago Bar Association.

If the conference indicates a need for further legal service, the lawyer will discuss with the client the subject of fees to be charged for such services, which will be a matter for agreement between them. It will also be understood that if a dispute over fees should arise, it will be submitted to the Chicago Bar Association's Committee on Professional Fees for final determination. Neither the lawyer nor the client will be charged any registration or other fee by the Association.

The Selection of Lawyers

For several months the committee in charge has been examining applications submitted by lawyers who wish to participate in the plan and interviewing them concerning their legal experience. So far more than 400 lawyers have indicated a desire to take part in the plan and additional applications are being received from day to day.

The plan will be operated under the

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careful supervision of the officers of the Association and the committee in charge. References to lawyers will be made in rotation to avoid any suspicion of favoritism. And no references will be made to any lawyer while he is an officer of the Association or member of the committee.

Aims of the Plan

It is hoped that the Lawyer Reference Plan will in the long run benefit both the public and the bar by creating a more general attitude among laymen of consulting lawyers before they get into trouble. While lawyers know that there are plenty of competent practitioners available at moderate rates, a large part of the public is not aware of this fact. When it becomes more widely known that the services of a qualified lawyer may be secured at a reasonable price, it is anticipated that there will be an increased use of lawyers' services which will save many persons from the unnecessary losses and expense likely to result from ignorance of their rights and liabilities, and at the same time benefit the members of the bar.

—WALTER T. FISHER in *Chicago Bar Record*, January, 1940.

Entire decision of the Mexican Supreme Court regarding the Expropriation of the Oil Companies.

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